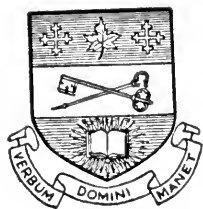


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A

REPORT OF THE CASE

OF

THE RIGHT REV. R. D. HAMPDEN, D.D.,

LORD BISHOP ELECT OF HEREFORD,

IN

HEREFORD CATHEDRAL, THE ECCLESIASTICAL COURTS,

AND THE QUEEN'S BENCH.



BY

RICHARD JEBB, Esq., M.A.,

OF LINCOLN'S INN, BARRISTER-AT-LAW.



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THE object of this publication is to give an accurate Report of all the proceedings in the Case of Dr. Hampden; a Case which has excited an extraordinary degree of public interest, on account of the important principles it involves.

The Editor begs to express his acknowledgments, to His Grace the Archbishop of CANTERBURY, for affording him ready access to documents in Lambeth Palace and the Office of the Vicar General; to the Judges, for authenticating their judgments; to the Counsel, for revising their arguments; and to the Dean of Hereford and JOHN BURDER, Esq., for furnishing him with copies of important Records embodied in the following publication.

Lincoln's Inn, April, 1849.

ERRATA ET CORRIGENDA.

- Page 28, note (*r*), col. 2, line 12, *for* "convent," *read* "covent."
35, col. 2, line 2, *for* a colon *put* a comma.
46, end of note (*f*), *add* " and also in 5 *Notes of Cases in the Ecclesiastical and Maritime Courts*, Suppl. ix."
94, line 27, *after* "uniform)," *for* a full stop, *substitute* a semicolon.
123, note, *for* "2 & 3 Vict." *read* "3 & 4 Vict."
140, note (*j*), line 2, *for* "Exeters," *read* "Exeter."
157, margin, *for* "Rex v. St. Margaret's," *read* "Reg. v. St. Margaret's."
157, text opposite, *for* "King," *read* "Queen."
163, line 34, *for* "Cranmer's," *read* "Parker's."
179, line 31, *for* "corcodia," *read* "concordia."
242, line 2 from end, *dele* note of interrogation.
361, margin, *for* "effected," *read* "affected."

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ABBREVIATIONS.



Ad. & Ell.	.	.	Adolphus and Ellis's Reports.
Bac. Abr.	.	.	Bacon's Abridgment.
B. & A.	.	.	Barnewall and Alderson's Reports.
B. & C.	.	.	Barnewall and Cresswell's Reports.
Black. Com.	.	.	Blackstone's Commentaries.
Burnet's Hist. Ref.	.	.	Burnet's History of the Reformation.
Burn, E. L.	.	.	Burn's Ecclesiastical Law.
Burr.	.	.	Burrow's Reports.
Camp.	.	.	Campbell's Nisi Prius Reports.
Carr. & P.	.	.	Carrington and Payne's Reports.
Carth.	.	.	Carthew's Reports.
Cas. t. Hardw.	.	.	Cases tempore Lord Hardwicke.
Cl. & Fin.	.	.	Clark and Finnelly's Reports.
Co.	.	.	Coke's Reports.
Co. Inst.	.	.	Coke's Institutes.
Co. Lit.	.	.	Coke upon Littleton.
Com. Dig.	.	.	Comyns's Digest.
Cro. Jac.	.	.	Croke's Reports in the time of James I.
C., M. & R.	.	.	Crompton, Meeson, and Roscoe's Reports.
Dowl. P. C.	.	.	Dowling's Practice Cases.
Dyer	.	.	Dyer's Reports.
East	.	.	East's Reports.
F. N. B.	.	.	Fitzherbert's Natura Brevium.
Gibs. Cod.	.	.	Gibson's Codex.
Godolph. Report	.	.	Godolphin's Repertorium Juris Canonici.
Hagg. Cons. Rep.	.	.	Haggard's Consistory Reports.
Holt	.	.	Reports temp. Holt.
Inst.	.	.	Coke's Institutes.
Jebb. & Symes	.	.	Irish Reports.
Jon. (Sir T.)	.	.	Sir T. Jones's Reports.
Jon. (Sir W.)	.	.	Sir W. Jones's Reports.
Jur.	.	.	Jurist.
Latch.	.	.	Latch's Reports.
Man. & Ryl.	.	.	Manning and Ryland's Reports.

Mees. & W.	.	.	Meeson and Welsby's Reports.
Mod.	.	.	Modern Reports.
Noy	.	.	Noy's Reports.
Palm.	.	.	Palmer's Reports.
Parl. Hist.	.	.	Parliamentary History by Cobbett.
P. & D.	.	.	Perry and Davison's Reports.
Plowd.	.	.	Plowden's Reports.
Phil.	.	.	Phillips's Reports in Chancery.
Q. B. Rep.		{	Queen's Bench Reports, by Adolphus and Ellis. (New Series).
Raym. (Ld.)	.	.	Lord Raymond's Reports.
Rep. or Co.	.	.	Sir E. Coke's Reports.
Rol. Abr.	.	.	Rolle's Abridgment.
Rolle	.	.	Rolle's Reports.
Rot. Parl.	.	.	Rotuli Parliamentorum.
Salk.	.	.	Salkeld's Reports.
S. C.	.	.	Same Case.
Show.	.	.	Shower's Reports.
St. Tr.	.	.	State Trials.
Str.	.	.	Strange's Reports.
T. R.	.	.	Term Reports, by Durnford and East.
Vaugh.	.	.	Vaughan's Reports.
Vin. Abr.	.	.	Viner's Abridgment.

THE CASE

OF

DR. HAMPDEN.

THE See of Hereford having become vacant, in December, 1847, by the translation of the Right Rev. Dr. Thomas Musgrave to the Archbishopal See of York, her Majesty was pleased to issue her *Congé d'élire*, by letters patent under the Great Seal, authorizing and commanding the Dean and Chapter of Hereford to elect a new bishop, together with a Letter Missive, recommending to them the Rev. Renn Dickson Hampden, D.D., Regius Professor of Divinity in the University of Oxford; both instruments bearing date the 16th of December, 1847.

Election of
Dr. Hampden.

Vacancy of See
of Hereford.

Accordingly, on the 18th of December, a Citatory Letter, under the Chapter seal, was issued, for convening a General Chapter, to elect a successor to Dr. Musgrave. It was in these terms:—

18th Decem-
ber, 1847.

“John Merewether, Doctor of Divinity, Dean of the Cathedral Church of Hereford, and the Chapter of the said Church, to our beloved in Christ, John Davis, Richard Downic, and Edward Staunton Jones, literate persons, jointly and severally, greeting. Whereas the Episcopal See of Hereford is now void and destitute of a pastor, by the translation of the Right Rev. Thomas Musgrave, the late Lord Bishop thereof, to the Archbishoprick of York: We, therefore, the Dean and Chapter aforesaid, having received the Queen’s Majesty’s licence for electing another Bishop, have fixed and appointed Tuesday, the 28th day of December instant, for such election, to be made in the chapter-house in our said cathedral church, between the hours of ten and twelve in the forenoon of the same day, with continuation and prorogation of the said hours, day, and place from thence following, if it shall be necessary, and have decreed that all and singular the Canons or Prebendaries of the said Church that have a right to vote on the said election, should be cited to appear at the said day, time, and place, to proceed, and see proceedings made, in the business of the said election, and in all and singular the acts and things which, according to the usage and custom of the said Cathedral Church, and the laws and statutes of England, may be necessary, and as the present state and condition

Citatory Letter
for a General
Chapter.

Election of Dr.
Hampden.

of the said Church may either allow or require. Wherefore, we empower and command you, jointly and severally, to cite or cause to be cited peremptorily all and singular the Canons or Prebendaries of the said Cathedral Church, by showing to them severally these presents (if it may conveniently be done), and by publicly affixing the same on the door of the west end of the choir, and also on the door that openeth into the chapter-house of the said Church, and afterwards by affixing and leaving on each of the said doors respectively a true copy of these presents, and also by all lawful ways, means, and methods whatsoever, whereby you can or may better or more effectually, so that this citation may most likely come to the knowledge of them so to be cited (whom by the tenor of these presents we do also cite), that they and every of them appear before us in the chapter-house aforesaid, on Tuesday, the 28th day of December instant, between the hours of ten and twelve of the forenoon, with continuation and prorogation of the days and hours from thence next following, and of places, if it shall be necessary, to proceed and see proceedings in the said business of election, and in all necessary acts, even to the finishing and perfecting thereof inclusively, to be done; and to do and perform all other things which the nature and condition of the said election may require. Moreover that you intimate, or cause to be intimated, peremptorily, to all and singular the persons aforesaid (to whom we do hereby also intimate), that if they do not appear at the day, time, and place aforesaid, we nevertheless will then proceed, according to law and custom, in the said business of election, and to finish the same, their absence in anywise notwithstanding; and what you shall do in the premises you, or either of you, that shall execute this our mandate, shall duly certify to us, at the day, time, and place aforesaid. In witness whereof we have caused our common seal to be set to these presents.

“Dated this 18th day of December, in the year of our Lord, 1847.

“RICH. UNDERWOOD, Chapter Clerk.” (L. s.)

28th Decem-
ber, 1847.

On Tuesday, the 28th of December (the day named in the above citation), the Chapter being assembled in the Cathedral Library, the Chapter Clerk delivered the writ of *Congé d'élire* to the Dean, who returned it to the Chapter Clerk, and the latter then read it aloud. It was in the following terms:—

Congé d'élire.

“Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to our trusty and well-beloved the Dean and Chapter of our Cathedral Church of Hereford, greeting.

“Supplication having been humbly made to us (a), on your part,

(a) Notwithstanding this recital, no supplication was, in fact, made by the Dean and Chapter, in the present case; indeed, the practice of making it has, for some time past, been very generally neglected, though it ought properly to

be observed in all cases of the vacancy of a See, whether by death, or by translation; see *Godolph. Repert.* 29; *Evans and Kiffin v. Askwith, Jon. (Sir W.)* 158; *Palm.* 457; *Latch*, 31, 233; *Noy*, 93; 2 *Rolle*, 450. On the last

Election of Dr.
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that, whereas the aforesaid Church is now void and destitute of the solace of a Pastor, by the translation of the Right Reverend Father in God, Doctor Thomas Musgrave, late Bishop thereof, to the Archiepiscopal See of York, we would be graciously pleased to grant you our fundatorial leave and licence to elect you another Bishop and Pastor; We being favourably inclined to your prayers in this behalf, have thought fit, by virtue of these presents, to grant you such leave and licence, requiring and commanding you, by the faith and allegiance by which you stand bound to us, that you elect such a person for your Bishop and Pastor, as may be devoted to God, and useful and faithful to us and our kingdom.

"In witness whereof, we have caused these our letters to be made patent. Witness ourself at Westminster, on the 16th day of December, in the eleventh year of our reign.

"By Writ of Privy Seal.

"LANGDALE.

BENTHALL."

At eleven o'clock, the Chapter proceeded to the choir, and the morning service of the day commenced.

After the first lesson, the Queen's Letter Recommendatory was read by the Chapter Clerk, as follows:—

"Victoria R.

"Trusty and well-beloved, we greet you well. Whereas the Bishoprick of Hereford is at this present void by the translation of the Most Reverend Father in God, Doctor Thomas Musgrave, late Bishop thereof, to the Archiepiscopal See of York, we let you weet, that for certain considerations us at this present moving, we of our princely disposition and zeal being desirous to prefer unto the same see a person meet thereunto, and considering the virtue, learning, wisdom, gravity, and other good gifts wherewith our trusty and well-beloved Renn Dickson Hampden, Doctor in Divinity, is endued, we have been pleased to name and recommend him unto you, by these presents, to be elected and chosen into the said Bishoprick of Hereford.

Queen's Letter
Missive.

occasion of the vacancy of the See of Canterbury, by the death of Archbishop Howley, the following form of signification and supplication was used:—

"To the Queen's most excellent Majesty, our Sovereign lady Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and so forth, your Majesty's most dutiful and faithful subjects, William Rowe Lyall, Doctor in Divinity, Dean of the Cathedral and Metropolitan Church of Christ, Canterbury, and the Chapter of the same Church, with all blessings and prosperity. Whereas the See of this your Majesty's Cathedral and Metropolitan Church of Christ, Canterbury, is now become vacant, by the lamented death of the late most reverend Father in God, William Howley, the last Arch-

bishop of Canterbury: We, the said Dean and Chapter do most humbly beseech your Majesty to grant us your Royal leave and licence to elect and choose a new Archbishop of the said See of Canterbury. And we have appointed and authorized our well beloved brethren, Robert Moore, Master of Arts, and the Honourable John Evelyn Boscawen, Master of Arts, Canons of the said Church, jointly or severally to implore your Majesty's grace and favour in this behalf. And we humbly beseech your Majesty graciously to receive such their and our supplication. God grant your Majesty a long and prosperous reign.

"Dated in our chapter-house, the 14th day of February, A. D. 1848, and in the 11th year of your Majesty's reign."

Election of Dr.
Hampden.

“Wherefore we require you, upon receipt hereof, to proceed to your election, according to the laws and statutes of this our realm, and our *Congé d’élire* herewith sent unto you, and the same election so made to certify unto us, under your common seal.

“Given under our Signet, at our Palace of Westminster, the 16th day of December, in the eleventh year of our reign.”

The assembly
of the Dean
and Chapter.

The members of the Chapter present, then proceeded to the chapter-house (*b*); where the citation was returned by mandatory, and the names of all the members of the Chapter were called over. The following appeared and answered to their names:—

The Very Rev. John Merewether, D.D., Dean, and Prebendary of Pyon Parva.

The Rev. Hugh Hanmer Morgan, B.D., Chancellor of the Choir, Canon Residentiary, and Prebendary of Putson Minor.

The Rev. Henry Huntingford, B.C.L., Canon Residentiary, and Prebendary of Colwall.

The Right Hon. and Rev. Lord Saye and Sele, D.C.L., Treasurer, Canon Residentiary, and Prebendary of Eigne.

The Rev. William Peete Musgrave, M.A., Canon Residentiary, and Prebendarius Episcopi.

* The Rev. William Edward Evans, M.A., Prælector, and Prebendary of Nunnington.

The Rev. Henry Wetherell, B.D., Archdeacon of Hereford.

The Very Rev. Charles Scott Luxmore, B.D., Prebendary of Inkberrow, (Dean of St. Asaph).

The Hon. and Rev. James Somers Cocks, M.A., Prebendary of Pratum Majus.

The Rev. James Johnson, M.A., Prebendary of Hampton.

The Rev. Robert Biscoe, M.A., Prebendary of Pratum Minus.

The Rev. Waties Corbett, M.A., Prebendary of Moreton Parva.

* The Rev. John Birch Webb, M.A., Prebendary of Preston Wynne.

* The Rev. Gilbert Frankland Lewis, M.A., Prebendary of Church Withington.

* The Hon. and Rev. Orlando Watkyn Weld Forrester, M.A., Prebendary of Bullinghope.

* The Rev. Robert Norgrove Pemberton, M.A., Prebendary of Moreton and Whaddon.

* The Rev. Richard Lane Freer, B.D., Prebendary of Gorwall and Overbury (*c*).

(*b*) For which purpose, according to a practice long observed, in all meetings of the *General Chapter*, the Lady Chapel was used, as the ancient Chapter House has since the time of the Commonwealth been in ruins. The *Lesser Chapter* usually assembles in the Chapter Room, off the S. E. aisle. On the present occasion, the congregation at large were admitted to the

meeting of the *General Chapter*, in consequence of the cathedral being under repair, which interfered with the ordinary arrangements for having the meeting private.

(*c*) A question was raised, whether those marked with an asterisk were merely honorary, and as such had no right to vote in general chapters. *Vide infra*, pp. 11, 13.

The Dean claimed the right of being Director of the election; and such claim was admitted. As Director, he pronounced all the absent Canons, Prebendaries, and other members of the General Chapter, who had failed to appear in obedience to the citation, contumacious, in the following terms:—

Election of Dr
Hampden.

Director ap-
pointed.

“In the name of God, Amen: We John Merewether, D.D., Dean of this Cathedral Church of Hereford, appointed Director of the Election of a future Bishop and Pastor of the same Church, with the unanimous assent, consent, and will of the whole Chapter of the said Church, do pronounce contumacious all and singular the Canons and Prebendaries of the said Cathedral, who have been lawfully and peremptorily cited to this day, hour, and place, to proceed and see proceedings in the business of electing a future Bishop and Pastor of the said Cathedral Church, according to the custom for time past used and observed in the said Church, and, having been so cited to this hour, time, and place, have been waited for and have not appeared. And in pain of their and every of their contumacies, We decree to proceed further in this business of Election, *saving all questions arising thereupon (d)*, the absence or contumacy of the persons so cited in anywise notwithstanding, and pronouncing the persons now appearing to be a full Chapter. And we do pronounce the same by these presents.”

Members
absent pro-
nounced con-
tumacious.

He next pronounced the members present, and entitled to vote, to be a full Chapter, as follows:—

“In the name of God, Amen, We John Merewether, D.D., Dean of this Cathedral Church of Hereford, appointed Director of this present Election, in our name, and also in the name and stead of all and singular our brethren and fellow Canons here present, admonish all and singular such as are either suspended, excommunicated, or interdicted (if any such there happen to be among us), who, by law, custom, or on any other account, ought not to be present or interest themselves in this present business of Election, that they immediately depart from this chapter-house, and permit us and the others of this Chapter to whom the right and power of Election belongeth, freely to proceed to and to make Election; protesting by every better and more efficacious way, means, and form of law whatsoever, by which we may the better and more effectually, and by which we ought, in our name, and in the stead and name of all and singular the Canons and Prebendaries our brethren aforesaid here present, that it is neither our nor their will or intention to admit such, as having no right, voice, or interest in this Election, or to proceed or elect with them. And we and they will, that the votes of such, (if any such shall afterwards be found, and which we hope may not happen), shall give no aid or assistance, nor bring any hurt or inconvenience in the said Election, but shall be deemed and taken altogether as invalid, and entirely as though the same had not been given or reserved; but we pronounce and declare, that the Canons present ought to be esteemed and taken as and for a full Chapter of the Cathedral Church aforesaid.”

The members
lawfully pre-
sent pro-
nounced a full
Chapter.

(d) The words here marked in *italics*, introduced on this occasion, are not usually inserted in the form.

Election of Dr.
Hampden.

Appointment
of a notary and
witnesses.

The election.

Declaration of
Canon Hun-
tingford.

Mr. Richard Underwood, the Chapter Clerk, was then appointed notary, and James Henry Knight and Richard Spencer, witnesses.

After some discussion the Chapter proceeded with the election. The votes were taken in regular order, beginning with the junior member present. The first fourteen members who were called upon, gave their votes for Dr. Hampden.

Canon Huntingford, the fifteenth in order, was next called upon to vote; whereupon he rose, and read from a paper as follows:—

“With the utmost respect for the Royal Prerogative, and with a full conviction that it is for the peace and safety of the Church, that the Crown should nominate to vacant sees, yet, in this particular instance, I feel obliged to defer complying with the recommendation which has been sent down to us, until a competent tribunal shall have pronounced to be well founded or not, the sentiments expressed by so many Bishops of our Church (*e*), and by so many

(*e*) In allusion to a remonstrance against Dr. Hampden's appointment, signed by thirteen Bishops, and sent to Lord John Russell, early in December; which is here subjoined, together with Lord J. Russell's answer.

“My Lord,—We, the undersigned Bishops of the Church of England, feel it our duty to represent to your Lordship, as head of Her Majesty's Government, the apprehension and alarm which have been excited in the minds of the clergy, by the rumoured nomination to the see of Hereford of Dr. Hampden; in the soundness of whose doctrine the University of Oxford has affirmed, by a solemn decree, its want of confidence.

“We are persuaded that your Lordship does not know how deep and general a feeling prevails on this subject; and we consider ourselves to be acting only in the discharge of our bounden duty, both to the Crown and to the Church, when we respectfully, but earnestly, express to your Lordship our conviction, that if this appointment be completed, there is the greatest danger, both of the interruption of the peace of the Church, and of the disturbance of the confidence which it is most desirable that the clergy and laity of the Church should feel in every exercise of the royal supremacy, especially as regards that very delicate and important particular, the nomination to vacant sees.

“We have the honour to be,

“My Lord,

“Your Lordship's obedient faithful
Servants,

“C. J. LONDON.

C. WINTON.

J. LINCOLN.

CHR. BANGOR.

HUGH CARLISLE.

G. ROCHESTER.

RICH. BATH AND WELLS.

J. H. GLOUCESTER AND BRISTOL.

H. EXETER.

E. SARUM.

A. T. CHICHESTER.

J. ELY.

SAML. OXON.”

“To the Right Hon. the Lord
John Russell, &c.”

ANSWER OF LORD JOHN RUSSELL.

“Chesham-place, Dec. 8, 1847.

“My Lords,—I have had the honour to receive a representation, signed by your Lordships, on the subject of the nomination of Dr. Hampden to the see of Hereford.

“I observe that your Lordships do not state any want of confidence, on your part, in the soundness of Dr. Hampden's doctrine. Your Lordships refer me to a decree of the University of Oxford, passed eleven years ago, and founded upon lectures delivered fifteen years ago.

“Since the date of that decree, Dr. Hampden has acted as Regius Professor of Divinity. The University of Oxford, and many bishops, as I am told, have required certificates of attendance on his lectures, before they proceeded to ordain candidates who had received their education at Oxford. He has likewise preached sermons, for which he has been honoured with the approbation of several prelates of our Church.

“Several months before I named Dr. Hampden to the Queen for the see of Hereford, I signified my intention to the Archbishop of Canterbury, and did not receive from him any discouragement.

members of one of our Universities (*f*). And here, it is not a favour—by no means—but an act of the merest justice to myself, considering how well known I am to most of you, when I ask you to acquit me of any personal disrespect towards a learned and talented divine, towards one who, I am told, is so estimable in his disposition;—when I request you to believe that I am not swayed by any of those unimportant (of course I mean, not unimportant in themselves, but still, *comparatively* unimportant) motives, viz. a preference for one political party to another, or, any feeling as between Churchmen and Dissenters, or between one party and another within the Church. But, while I ask you to believe that I am principally swayed by higher motives, motives which have no connection whatever with this earth, or with the present life, still I will frankly confess, that my mind is much affected by this circumstance; that among the Bishops of our Church, who have signed a certain remonstrance, there are, in the first place, two prelates, who are said to differ in opinion, in some other particulars, the Bishop of London, and the Bishop of Winchester; secondly, there is one so distinguished for mildness and Christian meekness,

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Hampden.

“In these circumstances, it appears to me, that should I withdraw my recommendation of Dr. Hampden, which has been sanctioned by the Queen, I should virtually assent to the doctrine, that a decree of the University of Oxford, is a perpetual ban of exclusion against a clergyman of eminent learning and irreproachable life; and that, in fact, the supremacy which is now by law vested in the Crown, is to be transferred to a majority of the members of one of our universities.

“Nor should it be forgotten, that many of the most prominent among that majority have since joined the communion of the Church of Rome.

“I deeply regret the feeling that is said to be common among the clergy on this subject. But I cannot sacrifice the reputation of Dr. Hampden, the rights of the Crown, and what I believe to be the true interests of the Church, to a feeling which I believe to be founded on misapprehension, and fomented by prejudice.

“At the same time. I thank your Lordships for an interposition which I believe to be intended for the public benefit.

“I have, &c,

“J. RUSSELL.”

“*To the Right Rev. the Bishops of London, Winchester, Lincoln, &c.*”

(*f*) In allusion to a declaration

made at Oxford by a large number of resident members of Convocation, on March 10, 1836 (for which, see the newspapers of that period); and to a statute of that university, shortly afterwards passed in Convocation. The statute is as follows:—

“Quum ab Universitate commissum fuerit S. Theologiæ Professori Regio, ut unus sit ex eorum numero, a quibus designantur selecti Concionatores, secundum Tit. xvi. § 8. (Addend. p. 150.) necnon ut ejus consilium adhibeatur, si quis Concinator coram Vice-Cancellario in quæstionem vocetur, secundum Tit. xvi. § 11. (Addend. p. 154.); quum vero qui nunc Professor est, scriptis suis publici juris factis ita res theologicas tractaverit, ut in hac parte nullam ejus fiduciam habeat Universitas;

“Statutum est, quod munus prædictorum expers sit S. Theologiæ Professor Regius, donec aliter Universitati placuerit. Ne vero quid detrimenti capiat interea Universitas, Professoris ejusdem vicibus fungantur alii; scilicet, in Concionatores selectos designando Senior inter Vice-Cancellarii Deputatos, vel eo absente, aut ipsius Vice-Cancellarii locum tenente, proximus ex ordine Deputatus (provisio semper, quod sacros ordines susceperit), et in consilio de Concionibus habendo Prælector Dominae Margarae Comitissæ Richmondia.

Election of Dr.
Hampden.

as the Bishop of Lincoln; and thirdly, there is one of so powerful an intellect, and such sincere piety, as the Bishop of Oxford. I say, I confess, that the above fact seems to me important, and confirms me in the resolution which, I just now stated, I felt obliged on the present occasion to adopt: viz., to wait for an impartial and solemn decision from a tribunal competent to pronounce it."

He concluded by voting to defer the election. He then handed in the above document, with a request that it might be placed on record: and it was received by the Chapter Clerk.

Canon Morgan, the next in seniority, voted for Dr. Hampden.

Declaration of
the Dean.

The Dean, when called upon, rose, and read from a paper as follows:—

"I am standing in the Sanctuary of the Most High God, and, together with my brethren, the ordained ministers of our Lord and Master, Jesus Christ, am called upon, in the name of the Sovereign of this land, to choose and elect such a person as may be meet to be the Bishop and Pastor of this Diocese. I solemnly declare here, in the Divine Presence, that it is my earnest and hearty desire to be faithful and bear true allegiance, to pay all humble duty and submissive obedience to her most excellent Majesty, the Queen of these dominions, who, I feel assured on her part, 'knowing whose minister she is, will above all things seek His honour and glory,' who is 'the King of kings and Lord of lords,' to whom, above all, I owe my first allegiance. And whereas, by the exercise of that civil privilege which gives to the first minister of the Crown the power of recommending to the Sovereign for nomination to vacant Bishopricks, the Reverend Renn Dickson Hampden, D.D., has been so nominated, and to us recommended by the official instrument this day laid before us, to the Bishoprick of Hereford: And whereas, we, the Dean and Chapter of this Cathedral Church, are forbidden, under very heavy penalties, to elect any other person into the said Bishoprick, except the said Renn Dickson Hampden: And whereas the University of Oxford, in full and lawful convocation (*g*), did decree that the said Renn Dickson Hampden should be deprived of certain functions of office in the said University, because, in his public writings, he had so treated theological subjects, that, in this respect, the University had no confidence in him; and that the convocation afterwards, within five years last past, after full debate, refused to rescind the said decree and deprivation: And whereas the said Renn Dickson Hampden is now under the effect of the said decree of the University of Oxford in convocation assembled; and from the careful and attentive perusal of the said writings, I do believe their decree to be just, those writings unsound in doctrine and dangerous in their tendency: And whereas, taking the premises solemnly and anxiously into consideration, I prepared an humble petition to her most excellent Majesty, dated the 17th day of

(*g*) Vide *supra*, p. 7, n.

December instant (*h*), praying postponement of the election until due investigation had been made, and a sufficient removal of the

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(*h*) The following is the petition referred to:—

“TO THE QUEEN’S MOST EXCELLENT
MAJESTY.

“May it please your Majesty,—We, your Majesty’s most dutiful and loyal subject, John Merewether, Doctor in Divinity, Dean of the cathedral church of Hereford, most humbly lay before your Majesty the assurances of our deepest and most heartfelt attachment to your Majesty’s sacred person and government.

“We thank your Majesty for having graciously granted to us your royal licence to elect a Bishop of our Church, in place of the Right Reverend Father in God, Thomas, late Bishop thereof, and for ‘requiring and commanding us, by the faith and allegiance by which we stand bound to your Majesty, that we elect such a person as may be devoted to God, and useful and faithful to your Majesty and your kingdom.’

“We also dutifully recognise the goodness of your Majesty in accompanying this your royal licence with letters missive, graciously announcing to us, that out of ‘your princely disposition and zeal you are desirous,’ as we cannot doubt, ‘to prefer unto the same see a person meet thereunto.’

“And we further acknowledge your Majesty’s gracious intention towards us in ‘naming and recommending unto us,’ by the same letters missive, Dr. Renn Dickson Hampden, your Majesty’s Reader in Theology in your University of Oxford, to be by us ‘elected and chosen unto the said bishoprick.’

“But we most humbly beseech your Majesty to permit us, as in duty bound, and in obedience to your Majesty’s gracious command touching the qualities of the person to be chosen by us, to represent (and if it be deemed necessary, by sufficient documents to prove), that somewhat more than eleven years ago the said Dr. Renn Dickson Hampden, then being the late King William’s Reader of Theology, the said University did, as by its laws, rights and privileges, and by the law of the land it is empowered, and on fit occasion bound to do, judge of the public writings of the said Dr. Hampden, and did solemnly decree, and by

a statute in its House of Convocation duly made did enact, that the said Dr. Hampden should be deprived of certain weighty functions, importing the right of judging of sound teaching and preaching of God’s word, which had been specially annexed by former statutes of the said University to his office therein; to wit, ‘that he be in the number of those by whom are appointed the select preachers before the University,’—and, further, ‘that his counsel be taken in case of any preacher being called (as by the statutes of the said University every preacher who may have delivered any unsound or suspected doctrine in any of his preachings is liable to be called) into question before the Vice-Chancellor.’ And such deprivation of Dr. Hampden was expressly declared in the said statute to have been decreed ‘because in his said published writings he has so treated matters theological, that in this respect the University hath no confidence in him.’

“Furthermore, six years afterwards, the Convocation of the said University having been called together to consider the question of the fitness of repealing the said statute, so that the said Dr. Hampden might be restored to the functions of which he had been as aforesaid deprived, the said Convocation did thereupon solemnly decree that the statute should not be repealed, but should still be (and, accordingly, it still continues to be) in full force and vigour; whereby the said Dr. Hampden stands to this day denounced by the judgment of the said University as ‘devoid altogether of its confidence in matters theological, by reason of the manner in which those matters have been treated by him in his published writings.’

“And here we deem it our duty to your Majesty humbly to submit, that not only by the people and Church of England, but by all your Majesty’s royal predecessors, the solemn decisions of either of your Majesty’s Universities of Oxford and Cambridge on questions and matters of theology, have always been deemed to carry with them very high authority, and that such is the renown of these your Majesty’s famous Universities throughout the reformed portion of Christen-

Election of Dr.
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censure and deprivation of the said Doctor Renn Dickson Hampden had been effected, by a just and competent tribunal; and, moreover, further pleaded to her Majesty's Prime Minister (i) the entire cir-

dom, that every where their judgment is heard with reverence and honour.

"Neither may we omit dutifully to lay before your Majesty, that to the office of a Bishop, to which we are commanded by your Majesty to choose 'a person meet to be elected,' essentially adheres the duty of judging of the doctrine of the clergy committed to his charge, especially of those who are to be instituted or licenced by him to the cure of souls—which high duty the University of Oxford has decreed, as aforesaid, that Dr. Hampden is, in its judgment, unfit to have confided to him; the distressing and disastrous consequences which must be expected to result from placing the diocese of Hereford, by the strong hand of power, under a person so characterized by so high authority, we are as unwilling as it would be painful to recount.

"For all these reasons, and not least because, in common, as we believe, with almost every considerate churchman, we are desirous and anxious that the prerogative of the Crown in nominating to bishopricks should be for ever established on its only firm foundation, the confidence of the Church in the wisdom, the justice, the purity, the considerate and conscientious moderation with which it is exercised; we most humbly pray your Majesty to name and recommend some other person whom your Majesty shall think meet to be elected by us for our Bishop, or that your Majesty will graciously relieve us from the necessity of proceeding to the election till you shall have been pleased to submit Dr. Renn Dickson Hampden's published writings (so judged as aforesaid by the Convocation of the University of Oxford), to the judgment either of the two Houses of Convocation of clergy of the province of Canterbury, which is now sitting, or of the Provincial Council of Bishops of the same province, assisted by such divines as your Majesty or the said Provincial Council shall be pleased to call, or of some other competent tribunal which your Majesty shall be graciously pleased to appoint. In order whereunto we have appointed for the day of election the 28th day of December instant, being the eleventh day from

the receipt of your Majesty's *congé d'élire*, and the last which we can lawfully appoint.

"And we are the more emboldened to lay this our humble supplication at the feet of your Majesty, by your known cordial attachment to our holy and apostolic Church, and by your faithful and uniform observance of the oath made by your Majesty at your coronation,—'That you will maintain and preserve, to the utmost of your power, the doctrine, discipline, and government thereof.'

"And even if it could be imagined that these last mentioned considerations apply not to our case, we should nevertheless confidently rely on your Majesty's experienced regard for that dearest and most sacred right of every class and description of your Majesty's subjects, the right of liberty of conscience, and on your having at the head of your Majesty's councils a noble Lord, the proudest boast of whose illustrious house, as well as of his own public life, it hitherto has been, to assert that right for all men against all opponents—a right which would, in our persons, be trampled to the very dust, if, in spite of all our just and reasonable reclamations, we be coerced under the threatened penalties of *præmunire* to elect for our Bishop a person whom we cannot conscientiously believe, so long as the aforesaid judgment stands against him, to be 'meet to be elected' to that most holy office.

"In conclusion, we would add our fervent prayer, as well as our most earnest hope, that your Majesty may long be permitted, by the King of kings, to reign in the hearts of all your subjects, the approved 'Defender of the Faith,' 'ruling all estates and degrees of men amongst us, whether ecclesiastical or temporal,' as is your sacred and undoubted right,—giving alike to all experience of the blessings of your just and beneficent government, and receiving from all the willing homage of grateful and confiding love. In witness whereunto we have affixed our decanal seal, this 17th day of December, in the year of our Lord, 1847." (L. S.)

(i) In a letter to Lord John Rus-

cumstances of the case, together with the awful and constraining obligations by which we are bound: And whereas the Primate of all England, with thirteen Bishops or more, have preferred their objections to the said appointment, and great numbers of the clergy and laity throughout the land, of every shade of religious opinion tolerated by the Church, have, by the most solemn appeals, intreated us to refrain from such election, until such time as the aforesaid objection should be removed, or another unobjectionable person substituted: I, taking all the aforesaid premises into my most serious consideration, do most humbly and imploringly supplicate Him whose Holy word declares that the hearts of kings are in His rule and governance, that her Majesty may even yet be pleased to reconsider our earnest and disinterested prayer, to correct and amend the errors and misfortunes which have arisen and still more seriously threaten us, from the ill considered advice of a misinformed minister, as on other occasions her Majesty's royal predecessors have done, and so may avert the injury which must otherwise be inflicted on the Church, and pacify the outraged feelings of her members. And here, in the sight of God, in the midst of His temple, and in the performance of my priestly office, I solemnly protest that it is no deficiency, in the smallest degree, of loyalty and humble devotion to our Sovereign, or of implicit respect and deference to the laws of this realm, which impel me to make this declaration. It is the dictate of my conscience, the conviction of my mind, that I am constrained so to act, as I tender the safety of my soul, and dread the vengeance due to infidelity, and insincerity, mockery, and profaneness, from a justly offended God, if I did not thus discharge what seems to me to be my duty. I, therefore, John Merewether, D.D., Dean of the Cathedral Church of Hereford, am dissentient, I cannot vote for Dr. Renn Dickson Hampden as a Bishop and Pastor of the Cathedral Church where I am Dean. And I further protest." [Here the Dean read the protest, which will be presently given as appended to the certificates of the election].

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A somewhat desultory discussion ensued upon the points adverted to in the protest; in the course of which discussion, allusion was made to stats. 33 Hen. 8, c. 27; 3 & 4 Vict. c. 113; and 4 & 5 Vict. c. 39, s. 16; but the question as to the admission or exclusion of honorary prebendaries(*j*) was neither moved and seconded, nor put from the chair. At the close of the discussion, Canon Morgan moved "that the election be now declared," Lord Say and Sele seconded the motion.

THE DEAN. "Fifteen having votes, or claiming to vote, have voted for Dr. Hampden; two have voted against him; the others being absent. It is now for the Chapter to say, whether that is an election. [After a short pause]. No one objects to that being considered an election, except those who dissent." He then expressed his own individual opinion that the election was invalid, a

sell, dated December 22, 1848; for (Jan. 1848), p. 81.

which see British Magazine, No. exciv.

(*j*) *Supra*, p. 4, n. (c).

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question which, he considered, must be raised and determined elsewhere; but, that in the mean time, if the election were to be regarded as valid, it would be their duty to decree three certificates, one for the Queen, one for the Bishop elect, and one for the Primate, which would respectively be to the following effect. He then read the subjoined instruments.

Certificate to
the Queen.

"To the Queen's Most Excellent Majesty, Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, &c.

"We, your Majesty's loyal and devoted subjects, the Dean and Chapter (*k*) of the Cathedral Church of Hereford, humbly make known and intimate unto your Majesty, that the See of the Bishoprick of Hereford being void by the translation of the Right Reverend Thomas Musgrave, late Bishop thereof, to the Archbishoprick of York, and your Majesty having granted unto us your royal licence that we should proceed to the election of a fit and proper person to supply the vacancy now occurring in the said Bishoprick, did proceed, on Tuesday, the 28th day of December instant, to elect a person provident and discreet, and recommended unto us by his knowledge, life, and morals, being born in lawful wedlock, of lawful age, ordained in priest's orders, and knowing and being able to defend the rights and liberties of the Church, and did on the same day elect the Reverend Renn Dickson Hampden, Doctor in Divinity, having regard as well to your Majesty's gracious recommendation of him as to his merits aforesaid, to be Bishop and Pastor of the Church and See of Hereford. In testimony whereof we have caused our common seal to be hereunto affixed, this 28th day of December, in the year of our Lord 1847." (L. s.)

Certificate
to the Arch-
bishop of Can-
terbury.

"To the Most Reverend Father in God, William, by Divine Providence, Lord Archbishop of Canterbury, Primate of All England, and Metropolitan.

"We, your humble and devoted servants, the Dean and Chapter of the Cathedral Church of Hereford, humbly signify, with all obedience, reverence, and honour, that the Bishoprick of Hereford being lately void by the translation of the Right Reverend Thomas Musgrave, late Lord Bishop thereof, to the Archbishoprick of York, and having received from her Majesty the Queen, her royal licence to proceed to elect the Reverend Renn Dickson Hampden, Doctor in Divinity, to the said Bishoprick and Episcopal seat in the Cathedral Church of Hereford, did on the day of the date hereof, proceed to elect a Bishop to fill the vacancy in the said See, and did elect the said Renn Dickson Hampden, he being a person provident and discreet, and recommended unto us by his knowledge, life, and morals, being born in lawful wedlock, of lawful age, or-

(*k*) The Dean objected to the use of the phrase, "*Dean and Chapter*," inasmuch as he dissented from the election. But his objection was overruled, it being considered that the

votes of the *majority* concluded the whole body, which was designated under the corporate title of "*Dean and Chapter*."

dained in priest's orders, and knowing and being able to defend the rights and liberties of the Church. In testimony whereof we have caused our common seal to be hereunto affixed, this 28th day of December, in the year of our Lord, 1847." (L. s.)

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"To the Reverend Renn Dickson Hampden, Doctor in Divinity.

Certificate to the Bishop elect.

"We, the Dean and Chapter of the Cathedral Church of Hereford, in Chapter assembled, humbly signify that the seat of the Bishop of the Cathedral Church of Hereford aforesaid, being void by the translation of the Right Reverend Thomas Musgrave, late Lord Bishop thereof, to the Archbishoprick of York, and having received her Majesty's royal licence to elect a Bishop and Pastor of the aforesaid Church and See, and by the authority and power of such licence, on the day of the date hereof, in our chapter-house in the Cathedral Church, being capitularly assembled, and making a full chapter there according to right and custom, having first monished and cited to such election all and singular the Canons and Prebendaries of the said Church (. (l)) did elect you, the aforesaid Renn Dickson Hampden, Doctor in Divinity (. (m)), to be Bishop and Pastor of the aforesaid Cathedral Church of Hereford, humbly requesting you that you will be pleased to signify your assent of your acceptance of the dignity, office, and burden of the Bishoprick aforesaid. In testimony whereof, we have caused our common seal to be hereunto affixed, this 28th day of December, in the year of our Lord, 1847." (L. s.)

To each of the above certificates, at the Dean's urgent request, was appended the following protest:—

"I, John Merewether, Doctor in Divinity, Dean of the Cathedral Church of Hereford, do hereby protest against this proceeding as an election, inasmuch as certain persons have voted, who (I have reason to believe, being merely honorary prebendaries, and not having conformed to the provisions of the statutes of this Church which I have sworn to observe), are not qualified to vote in Chapter (n), and also because the majority so constituted has not, according to the said statutes, the Dean and three Residentiaries at the least voting therein (o). And I require and claim the power of

The Dean's protest.

(l) Here a blank was left in place of the words, "and no one dissenting therefrom," objected to by the Dean as inadmissible.

(m) Here a blank was left in place of the word "unanimously," objected to by the Dean as inadmissible.

(n) *Vide supra*, p. 4, n. (c).

(o) The grounds of objection urged by the Dean, and summarily stated by him in this protest, are given more in detail in the following "Appeal," forwarded by him to the successor of Archbishop Howley on the 20th of March, 1848:—

"APPEAL.

"*To the Right Honourable and most Reverend Father in God, John Bird, by Divine Providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan, and Superior, and Vacante Sede Sole Visitor of the Cathedral Church of Hereford.*

"The dutiful and most respectful Appeal of John Merewether, Doctor in Divinity, Dean of the Cathedral Church of Hereford.

"Sheweth,—

"THAT the Statutes of the Cathe-

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extending this my protest, and that this my protest be duly annexed and appended to the significations and certificates of election, to the Bishop elect, to the Crown, and to the Archbishop.

“JOHN MEREWETHER, Dean.

“In the presence of me, }
“RICH. UNDERWOOD, N. P. }

J. H. KNIGHT, }
R.D. SPENCER, } Witnesses.”

dral Church of Hereford consist of several codes of laws for the government of that Church, of different periods; the first termed ‘Laudabiles Consuetudines,’ being the early Regula of this Church, but in many respects still acted upon in the present day; the second, probably drawn up by John Aquablanca, Dean, about the year 1289, a compilation and modification of the former; the third, revised during the reign and under the sanction of Queen Elizabeth; and the fourth, a revision of the last mentioned code, in which some trifling alterations were made, but which recite and re-enforce the early statutes or consuetudines in the following words,

“Cap. 4, s. 2. * ‘Reliquam vero Decani jurisdictionem vacante Decanatu ad aliquem Residentiariorum ex consensu Capituli spectare decernimus, iisque omnibus et singulis stricte injungimus, ut diligenter curent, laudabiles hujus Ecclesiæ Consuetudines, Leges Regni de rebus Ecclesiasticis, Canones Ecclesiæ Anglicanæ et constitutiones Episcopi visitatorias fideliter observari.’

“Again, cap. 12, s. 7. † ‘Cum vero fieri non possit ut consuetudines

Ecclesiæ Cathedralis et Collegii Vicariorum Choralium approbatæ, scripto brevi omnes comprehendantur: generaliter edicimus omnes eas in posterum ab iis ad quos pertinent, observandas modo nec verbo Dei, nec legibus aut statutis hujus Regni Angliæ, nec sanctionibus nostris Ecclesiasticis (quas injunctiones dicunt) sive canonibus, et constitutionibus Ecclesiæ Anglicanæ, neque istis deinceps statutis adversentur, aut hic alio modo provisæ atque immutatæ fuerint; alioqui in eo prorsus rescindendas, et antiquandas esse.’

“That upon occasion of the installation of a Bishop and a Dean, the following oath is respectively taken by each.

“† ‘Ego — — ab hac hora in autem, fidelis ero huic sacrosanctæ Ecclesiæ Herefordensi, necnon jura, libertates, privilegia, et consuetudines ejusdem pro viribus observabo atque ea manutenebo et defendam pro posse meo, sic me Deus adjuvet et hæc sancta Evangelia.’

“That upon occasion of the installation of every Dignitary and Prebendary of the said Cathedral Church, the following oath is taken by each.

“§ ‘Juro insuper ac Deo teste

* “We decree also that in the vacancy of the Deanery, all other jurisdiction of the Dean shall belong to some one Residentiary agreed upon by the Chapter, and we do strictly enjoin all and every of them to take especial care that the ‘laudable customs’ of this Church, the laws of the Kingdom concerning matters Ecclesiastical, the Canons of the Church of England, and the constitutions of the Bishop made in his visitation be faithfully observed.

† “But since all the approved customs of the Cathedral Church, and College of the Vicars Choral cannot be comprised in a short manuscript, we declare in general that all such shall hereafter be observed by those whom they concern, as are not contrary to God’s Word, the laws or statutes of this realm of England, our Ecclesiastical sanctions commonly called injunctions, or the Canons, or the Constitutions of the Church of England, or lastly to these statutes, or are here otherwise ordered and changed; or else shall in that respect be utterly made void and abrogated.

‡ “I, from this hour forward will be faithful to this sacred Church of Hereford, and also will with all my strength observe the laws, liberties, privileges, and customs of the same, and according to my power I will maintain and defend them. So may God help me, and these sacred Gospels.

§ “I do further swear and faithfully promise, God being my witness, that I will as far as I am able, observe all the statutes and laudable and allowed customs of this Cathedral Church of Hereford, the College of the Vicars Choral

The Chapter decreed the above certificates, with the protest appended to each. They next decreed a Proxy to three Notaries Public (Mr. R. Underwood, Mr. F. H. Dyke, and Mr. J. Burder),

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fideler promitto, me omnia statuta et laudabiles ratasque consuetudines hujus Ecclesiæ Cathedralis Herefordensis, Collegii Vicariorum Choralium, ibidem, Hospitalis sive Domus Eleemosynariæ Sti. Ethelberti ibidem Hospitalis Ledburiensis; si et quatenus me meamque personam attigerint pro viribus observatum; commodum et honorem dictorum respective Ecclesiæ, Collegii, et Hospitalium, pro virili omnique quo possum, sano consilio et industria proventurum et procuraturum; si quod ipsis aut ipsorum alicui damnum aut periculum creari vel intentari rescivero, Decano et Capitulo quam primum rectorum, et pro viribus propulsaturum; nihil quod in damnum aut periculum Ecclesiæ, Collegii, aut Hospitalium vergere posse intellexero, foris revelaturum; dimissiones in posterum non facturum nec faciendis consensurum nisi ex mente et sensu statutorum supra scriptorum; Decano denique omnibusque autoritate in me fungentibus in omnibus legitimis et honestis, absque omni ad alios iudices aut iudicem appellatione, provocatione, querela, aut supplicatione frustratoria (præterquam in causis per statuta ad Episcopum Herefordensem aut Archi-

episcopum Cantuariensem de jure deferendis) morem gesturum atque obtemperaturum; ita Deus mihi sit propitius in Jesu Christo.'

"That in the letters patent prefixed to the said latest statutes, in which the last oath is enjoined, bearing the great seal of King Charles the 1st, the following words appear. * 'Carolus Dei gratia magnæ Britannicæ, Franciæ, et Hiberniæ Rex, fidei defensor, &c. Dilectis Decano Ecclesiæ nostræ Cathedralis Herefordensis, et Canonicis Residentiariis ejusdem, *Capitulum facientibus* necnon Cæteris Canonicis et Prebendariis dictæ Ecclesiæ aut in aliqua dignitate, vel officio constitutis, Archidiaconis, Cancellario, Precentori, Thesaurario, Prælectori, Custodi etiam Collegii Vicariorum et Vicariis Choralibus, Custodi Hospitalis Sancti Ethelberti Herefordensis, et Guardiano Hospitalis Ledburiensis, universis denique membris, atque ministris dictorum Ecclesiæ Collegii et Hospitalium, Salutem.'

"That in cap. 1, s. 5, it is enacted that certain payments be made, a bond entered into, and specified observances kept by each Prebendary admitted to the Church.

there, the Hospital or Alms House of St. Ethelbert there, and the Hospital of Ledbury, wherein, and as far as they concern me and my person; that I will promote and procure the respective credit and profit of the said Church, College, and Hospitals, to the utmost of my power and diligence; if I shall know of any hurt or danger designed or attempted against them, or any of them, I will reveal it to the Dean and Chapter with all speed, and do what I can to hinder it; I will not tell anything abroad which I may imagine possible to tend to the injury or danger of the Church, the College, or Hospitals; I will not make or consent to those who make leases for the future, but according to the sense and meaning of the statutes above-written; lastly, I will pay respect and obedience to the Dean, and all others that belong to this Cathedral Church, and have any jurisdiction over me, in all things lawful and honest, without any manner of appeal, provocation, complaint, or supplication to any other judge or judges, save in such causes as by these statutes may lawfully be brought before the Bishop of Hereford, or Archbishop of Canterbury. So help me God, through Jesus Christ.

* "Charles, by the grace of God of Great Britain, France, and Ireland, King, Defender of the Faith, to our well-beloved the Dean of our Cathedral Church of Hereford, and Canons Residentiaries thereof, who make the Chapter—and also to the other Canons, and Prebendaries of the said Church, and such as have any dignity or office therein, to the Archdeacons, Chancellor, Precentor, Treasurer, Prælector, Custos of the College of Vicars, and the Vicars Choral, to the Custos of the Hospital of St. Ethelbert, in Hereford, and the Warden of the Hospital of Ledbury, and lastly, to all members and ministers of the said Church, College, and Hospitals, greeting.

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Proxy from
the Dean and
Chapter.

to deliver the certificates respectively to the Queen, the Archbishop, and the Bishop elect. The Proxy ran thus:—

“Be it known unto all men by these presents, that we, the Dean

“That in cap. 3, s. 7, it is enacted
* ‘In iis vero negotiis quæ per plurimum suffragiorum Collectionem Capitulariter definienda sunt nihil omnino vim aliquam roburve obtinere patimur, sub pœna perjurii in contrarium admittentibus, nisi Decanus et tres ad minimum Residentiarii in iisdem plane consenserint, excepto tamen semper quod, si qua in re contigerit, omnes ad unum Residentiarios reliquos consentire, atque Decanum solum dissentire, in eo casu, ejus dissentio nihili erit, sed quod cæteri omnes concorditer ordina-verint, pro rato et valido reputabitur ad omnem juris effectum, inque acta referetur, et sigillo communi (si opus fuerit) communicetur, ut res per Decanum et Capitulum conclusa, concessa atque confirmata.’

“That in cap. 10, s. 6, it is enacted,
† ‘Nolumus sub sigillo Ecclesiæ communi aliqua feoda aut officia concedi, Beneficiorum advocaciones, Donationes et Præsentationes, aliasve concessiones ullas fieri, Possessiones quaslibet Ecclesiæ clocari, aut utendas, fruendas, per syngraphas, sive indenturas dimitti, nisi in Capitulis

vicesimo quinto die Junii, aut postridie ejus diei, aut postridie Rationum ecclesiæ finitarum, aut vicesimo quarto Martii celebrandis quotannis, *idque Decano præsentè.*’

“That in the early statutes, it was enacted and never since abrogated, but on the contrary, enjoined by the injunctions of King Edward 6, and other authorities, † ‘Item notandum quod sigillum Capituli semper debet reponi in Thesaurò, et sub tribus Clavibus ibi custodiri, quarum una debet residere penes Dominum Decanum, et aliæ duæ penes duos Canonicos, ad hæc electos a toto capitulo;’ and that this was generally acted upon to a late period, as appears by the Act Books, though at present neglected; the necessity of the Dean’s presence however, at the sealing of documents, was enforced on occasion of an appeal in the year 1838, by the decision of the late Bishop.

“That by cap. 13, it is laid down what are the functions of the General Chapter, and the times at which they are to meet, namely: § ‘Si aliquis de vero sensu alicujus ex istis aut aliis

* “But in those matters which are to be decided in Chapter by the collection of votes, we permit nothing to obtain any force or strength, *upon pain of perjury to those who endeavour the contrary*, unless the Dean, and three Residentiaries, at least, do give their absolute consent thereto, always excepted that where it happens that every one of the other Residentiaries do agree, and the Dean alone do disagree, in such a case his dissent shall signify nothing, but what all the rest shall unanimously ordain shall be deemed firm and good to all intents and purposes, and shall be entered in their acts, and, if need be, shall pass under their common seal as a matter concluded, granted, and confirmed by the Dean and Chapter.

† “There shall not be granted under the common seal of the Church any fees, or offices, advowsons of benefices, donations and presentations, or any other grants made—any of the possessions of the Church farmed or leased out by indenture, in writing, but at the Chapters to be held yearly upon the five and twentieth day of June, or the morrow after that day, or the morrow after the end of the audit, or upon the four and twentieth day of March, and that in the presence of the Dean.

‡ “Also it is to be noted that the seal of the Chapter always must be placed in the treasury, and under three locks and keys there be guarded, of which one must remain in the possession of the Dean, and the two others in the possession of two Canons chosen for that charge by the whole Chapter.

§ “If any doubt shall hereafter arise about the true meaning of any of these or any other statutes which in anywise concerns the Hospitals of Ledbury, and St. Ethelbert’s, or the College of the Vicars Choral, or any of the Canons or Prebendaries, that are not Residentiaries, or any other inferior minister of this Church, it shall be interpreted and settled by the votes of the Dean and the greater part of the whole Ecclesiastical assembly made up of all the Canons

and Chapter of the Cathedral Church of Hereford, in our chapter-house capitularly assembled, and making a Chapter there, have nominated, constituted, and appointed Richard Underwood, Francis

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statutis eruendo posthac emergerit scrupulus, qui ad Hospitalia Ledburiense vel Sancti Ethelberti, sive ad Collegium Vicariorum Choralium, aut aliquem ex Canonicis sive Prebendariis non Residentiariis aliumve inferioris conditionis hujus Ecclesiæ Ministrum aliqua ratione pertineat—Decani, et majoris Partis Conventus Ecclesiastici totius ex omnibus tum præsentibus Canonicis sive Præbendariis conflati, quod generale Capitulum vocant quodque bis quotannis postridiè scilicet Rationum finitarum et vicesimo quinto die mensis Junii, aut postridiè ejus diei celebrari volumus, suffragiis expediatur et explicetur.

“That circumstances have recently occurred which, if uniformity of practice, peace and good understanding in the Church, and any certainty or confidence in the course of proceeding, not to say any credit or respect to the Church may be hoped for, and especially at this time, require imperatively that it should be declared by due authority, whether the aforesaid oaths are binding on those who take them, or whether they be a mere formal mockery of solemn obligation, in a most awful sense, the taking of God’s Holy Name in vain.

“We therefore, appeal to your Grace, during the vacancy of, or at least incomplete appointment to, the Bishoprick of Hereford, to issue your decision on this most important point, and if, as we cannot for a moment doubt, that such decision must affirm the validity and stringency of such oaths,—that they are not merely formal and nugatory, profane mockery, and taking of God’s name in vain, then we submit that these oaths are broken, if the statutes of Hereford Cathedral as required, are not observed, and that all acts not conformable to them, are null and void. Thus as touching the asserted election of the Reverend Dr. Renn Dickson Hampden, we allege, that by the letters patent of the late King Charles I., to which the great

seal is still attached, it is declared that “*the Chapter consists of the Dean and Canons Residentiaries*,” to whom alone the *Congé d’élire* was addressed, and that the other members of the Church are not therein recognised as the Dean and Chapter, but that one Archdeacon, five Prebendaries, and six Honorary Prebendaries claimed to vote, and did so vote at the said asserted election, and that the asserted election is invalidated thereby.

“Further, we allege, that by the said statutes certain requirements are made of all who become members of the said Church, before they can be fully possessed of the said membership, or dignity, and qualified to act, and that at the said election (as asserted) six Honorary Prebendaries claimed to vote, not one of whom had complied with those requirements of the statutes, and we submit that the said asserted election is invalidated thereby.

“Further, we allege, that although in cap. 3, s. 7, it is expressly required that in all matters where the collection of votes takes place, nothing shall be a valid act, unless *the Dean and three Residentiaries* vote for it, under the penalties of perjury to those who advocate otherwise, yet at the said asserted election, the Dean and one Canon voted against that election, which therefore cannot be otherwise than invalidated thereby.

“Further, we allege, that the caputular seal was attached to the certificates of election (as asserted) in spite of the Dean’s protest which was annexed to each, and in direct opposition to him; that it was not kept in a box with three locks and three keys, of which one should be in his custody, so that he had no power to prevent the use thereof, when not duly authorized by a valid act of the Dean and Chapter, as in the present case as it is implied he ought to have, in the statute cited, and the injunctions of King Edward 6, and other authorities; and

or Prebendaries then present, which they call the General Chapter, and which we will shall meet twice in the year, to wit, on the day after the ending of the audit, and on the twenty-fifth day of the month of June, or the day after the same.

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Hart Dyke, and John Burder, Notaries Public, jointly and severally to do and perform all and singular the things hereunder written (so that there be no superiority among them, but that what one of them shall begin, the other of them shall have liberty to carry on and finish). And we do, by these presents, nominate, constitute, and appoint them our true and lawful Proctors, jointly and severally for us, and in our names, to present and certify the election of a Bishop to the See of Hereford, this day made and published in the said Cathedral Church of Hereford, and its form, manner, and process, to the person so elected, and him earnestly to ask and request, as far as relates to himself and his own person, to give his assent and consent to the election so made and published; and to present the manner and form of the said election to her Majesty, Queen Victoria, our most gracious Sovereign, Defender of the Faith, and of the said Cathedral our most worthy Founder and Patron, and to intreat her royal consent and assent to the said election, and to supplicate and obtain from the Most Reverend Father in God, William, by Divine Providence, Archbishop of Canterbury, and Primate and Metropolitan of all England, that he would be pleased to grant his rescript, concerning and for the confirmation of the said election, and to do and perform all that is necessary to be done in the business of this election. In testimony whereof, we have hereunto affixed our common seal, this 28th day of December, in the year of our Lord, 1847.” (L. s.)

that the asserted election is also invalidated thereby.

“And furthermore, we allege, that in the cap. 13 of the said statutes, the assembly of the General Chapter, which is composed of the members of the Cathedral Church, over and above the Dean and Canons Residentiary, is fixed for two days in the year only, of which the 28th of December is not one, and their duties and functions therein pointed out; and therefore it appears that such members of the Cathedral Church of Hereford, were not entitled to vote on the said occasion, and that having so voted the asserted election is thereby also invalidated.

“Wherefore our earnest appeal and entreaty is for the good of the Church, and the peace and regularity of proceeding in Chapter that your Grace will determine for our guidance, whether the oaths we, and all admitted to our Church are required to take, are binding on us, and not a mere formal mockery, perpetrated for the mere sake of obtaining such station and office, in consequence, whether the provisions of our said statutes must be observed,—specially whether the Chapter is not confined to the Dean and Canons Residentiary only? whether to pass a valid act, the Dean and three,

or at least a majority of the body, *i. e.* the Dean and two Residentiaries (including of necessity the Dean), now that one canonry is suspended, must not consent to make such act valid. Whether the capitular seal must not in future be kept in a box with three locks and three keys, of which the Dean shall retain one, and two of the Canons elected as Clavigers for that purpose one each? And we further appeal to your Grace not merely to settle and resolve these questions for the future guidance and welfare of our Church, and the regularity and peace of our proceedings, but also to surcease from the consecration of Dr. Renn Dickson Hampden, as Bishop of this See, until such time as these points shall have been duly investigated and determined, and the validity or otherwise of his election clearly ascertained, and such further proceedings thereupon adopted as the case shall require.

“Given under our hand and Decanal seal, at Hereford, this 20th day of March, in the year of our Lord God one thousand eight hundred and forty-eight.

“(L. s.) JOHN MEREWETHER,
“Dean of Hereford.

“Receipt acknowledged by the
Archbishop, March 22, 1848.”

After this, the Dean and Chapter returned into the Choir, where the Dean, as Director, published and declared the election to the congregation in these terms:—

Election of Dr. Hampden.

“Be it known unto all men, that *a majority of the Chapter* (o) of this Cathedral Church of Hereford, in full Chapter this day assembled, have, in obedience to Her Majesty’s licence, chosen the Reverend Renn Dickson Hampden, Doctor in Divinity, to be the future Bishop of this Cathedral Church and See, in the room of the Right Reverend Father in God, Thomas Musgrave, late Lord Bishop thereof, now translated to the Archbishoprick of York.”

Publication of the election.

The Te Deum was then performed, and the rest of the service proceeded with. After which, the Dean and Chapter returned to the chapter-house, where the Chapter Seal was affixed to the certificates, by a resolution of the majority present, in opposition to the Dean, who refused to be a party to the act.

AT DOCTORS' COMMONS.

The next proceeding was the consent of Dr. Hampden to his own election. This took place on the morning of Tuesday the 11th of January, 1848, in the Dining Room at Doctors’ Commons, before DR. LUSHINGTON, Chancellor of the Diocese of London, and SIR JOHN DODSON, Master of the Faculties. Dr. Hampden, attended by Mr. Underwood, as Proctor for the Dean and Chapter of Hereford, and by Drs. Bayford and Twiss, as his Advocates, was introduced to the Court.

11 Jan. 1848.
Consent of Dr. Hampden.

Mr. *Underwood*:—“May it please your Lordship, I exhibit my proxy for the Reverend the Dean and Chapter of the Cathedral Church of Hereford, and present to your Lordship a certificate of your being elected to be Bishop and Pastor of the said See; and pray, and once and again earnestly request and intreat, that your Lordship will be pleased to give your consent to the said election.”

Prayer for consent.

The schedule of consent was then read, and afterwards signed, by Dr. Hampden. It was in these terms:—

“In the name of God, Amen. I, Renn Dickson Hampden, Doctor in Divinity, regularly and lawfully named and elected Bishop and Pastor of the Cathedral Church of Hereford, agree to accept of such election of myself and my person, as made and celebrated, on the part and behalf of the Reverend the Dean and Chapter of the Cathedral Church of Hereford, earnestly requested and intreated; trusting in the clemency of Almighty God, to accept of such election of myself and my person, so as is premised, made, and celebrated, to the honour of Almighty God, Father, Son, and Holy Ghost; and do give my assent and consent, in this writing, to the said election.”

Schedule of consent.

(o) The form usually runs:—“We words in the text were substituted on the Dean and Chapter;” for which the this occasion.

Consent of Dr.
Hampden.

The parties and officials then immediately proceeded to the Church of St. Mary-le-Bow, where, according to ancient usage, a Court was held for CONFIRMING the Election.

IN BOW CHURCH.

Confirmation of
Dr. Hampden.

A few days before the day appointed for the confirmation of the election, the following citation had been posted on the principal door of Bow Church.

Citation
against op-
posers.

“WILLIAM, by Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, To all and singular clerks and literate persons, whomsoever they be, in and throughout our whole province of Canterbury, greeting. Whereas the Episcopal See of Hereford becoming lately vacant by the translation of the Right Reverend Father in God, Doctor Thomas Musgrave, late Bishop thereof, to the Archiepiscopal See of York, the Dean and Chapter of the Cathedral Church of Hereford aforesaid, after having petitioned for and obtained Her Majesty's Royal licence for an election to be celebrated of a new and future Bishop, did capitularly assemble, and, making a Chapter, did prefix and assign a certain time; and regularly proceeding at the time appointed and assigned in the business of such election, did elect the Reverend Renn Dickson Hampden, Doctor in Divinity, to be their Bishop and Pastor of the said Cathedral Church of Hereford: And whereas Her most Excellent Majesty, our most gracious Sovereign Lady, Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, hath at the humble petition of the said Dean and Chapter of Hereford, given her royal assent and consent to the said election of the person of the said Reverend Renn Dickson Hampden, Doctor in Divinity, as she hath signified to us by her letters patent under the Great Seal of Great Britain, requiring us to confirm the aforesaid election, and the person elected, according to the tenor and exigency of the laws and statutes of this realm, with all convenient speed, as by her said letters patent under the Great Seal of Great Britain, to us inscribed and directed, relation being thereto had, doth and may more fully appear: And whereas in obedience to her said royal commands (as is our duty) to proceed in the said business of such confirmation, according to the tenor of the laws and statutes of this realm in that case published and provided, we have decreed all and singular opposers (if any such there may be), who shall say against, except to, or oppose the said election, the form thereof, or the person elected, to be cited and summoned to appear on the day, at the hours, and place, and for the purposes underwritten, justice so requiring: To you therefore jointly and severally we commit and strictly enjoin, and require you, to cite or cause to be cited peremptorily, with a loud and audible voice, in the parish Church of Saint Mary-le-Bow, in the city of London, and also by affixing these pre-

sents in some proper place within the said parish Church, or other public places where it shall seem most expedient, all and singular opposers, if any such there may be, in special, or in general, who against the said election, the form thereof, or the person so as aforesaid elected, shall say, except to, or oppose; that they and every of them appear before us, or the Right Worshipful Sherrard Beaumont Burnaby, Doctor of Laws, our Vicar General of our province of Canterbury, the Right Honourable Sir Herbert Jenner Fust, Knight, Doctor of Laws, Official Principal of our Arches Court of Canterbury, the Right Honourable Stephen Lushington, Doctor of Laws, Chancellor of the Diocese of London, and the Right Worshipful Sir John Dodson, Knight, Doctor of Laws, our Master of the Faculties, our commissioners appointed in this behalf, any or either of them, in the parish Church of Saint Mary-le-Bow aforesaid, on Tuesday the eleventh day of January instant, between the hours of nine and twelve in the forenoon of the same day, with continuation and prorogation to be made of days then following, and places, if need so require, to say against, except to, or oppose the said election, the form thereof, or the person elected, if they think themselves concerned, in due course of law; And further to do and receive what shall be just, and the nature and quality of the said business demand and require of them: Moreover that you intimate, or cause to be intimated, peremptorily, in manner and form before recited, all and singular opposers, if any there be, in special or in general, whom we do so intimate by the tenor of these presents, that if the said so cited shall appear, on the said day, hours, and place, before us, or our aforesaid commissioners, any or either of them, and against the said election, the form thereof, or the person elected, shall say, except to, or oppose, or not, we will nevertheless proceed, and intend to proceed, in the said business of confirmation, according to the exigency of the laws and statutes of this realm, or so will our commissioners aforesaid, any or either of them, proceed and intend to proceed, the absence or other contumacy of the so cited, intimated, and not appearing, in anywise notwithstanding. And what you shall do in the premises you shall duly and authentically certify us or our aforesaid commissioners, any or either of them; or so let such one of you certify who shall execute this our mandate.

“Dated this seventh day of January in the year of our Lord one thousand eight hundred and forty-eight, and in the twentieth year of our translation.

“F. H. DYKE, Registrar.” (L. s.)

On the day appointed in the preceding citation, the ceremonies in Bow Church commenced at eleven o'clock, by the Rector of the parish reading the Litany. After which the Court was formed in the centre aisle of the Church, near the chancel.

11 Jan. 1848.

Present: DR. BURNABY, Vicar General of the Archbishop of Canterbury, with whom DR. LUSHINGTON and SIR JOHN DODSON were associated (p).

Commissaries present.

(p) It did not, at the time, appear, in what capacity Dr. Lushington and Sir John Dodson were associated with

the Vicar General; for the Commission from the Archbishop of Canterbury, (given below), directed to them along

Confirmation of Dr. Hampden.

Citation against opposers.

Confirmation of
Dr. Hampden.

Advocates and
proctors.

Advocates for the Dean and Chapter,

DR. BAYFORD.

DR. TWISS.

Proctor for the Dean and Chapter,

MR. UNDERWOOD.

Proctor for Dr. Hampden,

MR. GLENNIE.

Advocates for the Opposers,

DR. ADDAMS.

DR. HARDING.

DR. R. PHILLIMORE.

with whom was associated Mr. A. J. STEPHENS, as Counsel.

Proctors for the Opposers,

MESSRS. R. E. A. TOWNSEND and F. ROBARTS.

The Commissioners being seated,

Mr. *Underwood*. Right worshipful Sirs, I exhibit my proxy for the Reverend the Dean and Chapter of the Cathedral Church of Hereford, and make myself a party for them, and do present

with Sir Herbert Jenner Fust (who did not attend), was not produced or read in Bow Church. It was publicly produced, for the first time, in the Queen's Bench, on January the 26th, during the argument of Dr. Addams for making absolute the rule for a mandamus (*vide post*). The Commission was in these terms:—

Commission,
from the Me-
tropolitan, to
confirm.

“William, by Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, To our well beloved in Christ the Right Worshipful Sherrard Beaumont Burnaby, Doctor of Laws, our Vicar General of our Province of Canterbury; the Right Honourable Sir Herbert Jenner Fust, Knight, Doctor of Laws, Official Principal of our Arches Court of Canterbury; the Right Honourable Stephen Lushington, Doctor of Laws, Chancellor of the Diocese of London; and the Right Worshipful Sir John Dodson, Knight, Doctor of Laws, our Master of the Faculties; Greeting. Whereas we have received Letters Patent of the Most Serene Princess, our Sovereign Lady, Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and so forth, sealed with her Great Seal, bearing date at Westminster the sixth day of January in the eleventh year of her most auspicious reign; wherein we are commanded (among other things) to confirm the election of the person of the Reverend Renn Dickson Hampden, Doctor in Divinity, to be Bishop and Pastor of the Cathedral Church of

Hereford, within our Province of Canterbury: We, therefore, being desirous, with that duty that becomes us, to fulfil and obey Her Majesty's commands, do, by these presents, give and grant our Commission to you the said Sherrard Beaumont Burnaby, Sir Herbert Jenner Fust, Stephen Lushington, and Sir John Dodson, any or either of you, full power and authority for us, and in our stead, to approve and confirm the election of the person of the said Renn Dickson Hampden, made and solemnized, and the election itself, and the person so elected, according to the direction of the laws and statutes of this realm of England, and according to the tenor, form, and effect of Her Majesty's said Mandate made and directed to us in this behalf, as aforesaid, so far as it shall appear to you, any or either of you, that the said election was and is rightfully and lawfully made, to approve and allow of, and rightfully and lawfully to supply all defects (if any shall have happened), and all and singular other thing and things, act and acts, which in this behalf shall be necessary or in anywise requisite to do, exercise, and perform.

“In Testimony whereof, We have caused our Seal Archiepiscopal to be affixed to these presents. Given at Lambeth Palace, the seventh day of January in the year of our Lord one thousand eight hundred and forty-eight, and in the twentieth year of our translation.

“W. (L. S.) CANTUAR.”

unto you the letters patent of our Sovereign Lady the Queen, issued under the Great Seal of Great Britain, for the confirmation of the election of the Reverend Renn Dickson Hampden, D.D., to be Bishop and Pastor of the said Cathedral Church of Hereford, and do pray that the same may be read.

Confirmation of
Dr. Hampden.

THE VICAR GENERAL. Let the letters patent be read.

Mr. *F. H. Dyke*, Principal Registrar for the province of Canterbury, read them, as follows:—

“Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the most Reverend Father in God, our right trusty and right entirely beloved councillor William, by Divine Providence, Archbishop of Canterbury, Primate and Metropolitan of all England, and to all other Bishops herein concerned, greeting. Whereas the episcopal See of Hereford, being lately vacant by the translation of the Right Reverend Father in God, Dr. Thomas Musgrave, late Bishop thereof, to the archiepiscopal See of York, upon the humble petition of the Dean and Chapter of our Cathedral Church of Hereford, we did by our letters patent grant them our leave and licence to choose to themselves another Bishop and Pastor of the said See, and the said Dean and Chapter, by virtue of our said leave and license, have chosen for themselves and the said Church, our trusty and well-beloved Renn Dickson Hampden, Doctor in Divinity, to be their Bishop and Pastor, as by their letters, sealed with their common seal, directed to us thereupon does more fully appear: We, accepting of such election, have given our Royal assent thereto, and this we signify unto you by these presents, requiring and strictly commanding you, by the faith and allegiance by which you stand bound to us, to confirm the said election, and to consecrate the said Renn Dickson Hampden, so as aforesaid chosen to be Bishop of the said See, and to do, perform, and execute with diligence, favour, and effect, all and singular other things which belong to your pastoral office, according to the laws and statutes of England in this behalf made and provided. In witness whereof we have caused these our letters to be made patent. Witness ourself at Westminster, the 6th day of January, in the eleventh year of our reign. By writ of Privy Seal.

Letters patent
to confirm.

“LANGDALE. BENTHALL.”

Mr. *Underwood*. I humbly pray that you will be pleased to take upon you the duty of the said confirmation, and to decree that it be proceeded in, according to the form of the said letters patent, and the exigency of the law.

THE VICAR GENERAL. In obedience to the command of our Sovereign Lady the Queen, we do take upon us the duty of the confirmation of the said election, and do decree that it be proceeded in, according to the force, form, and effect of the said letters patent, in the presence of Francis Hart Dyke, Notary Public, Principal Registrar of the province of Canterbury.

Decree to
proceed.

Dr. Hampden was then conducted from his pew to the table, and took his seat opposite Dr. Burnaby.

Mr. *Underwood*. I present unto you the Reverend Renn Dickson Hampden, D.D., elected Bishop and Pastor of the Cathedral

Confirmation of
the election.

Presentation of
the Bishop
elect.

Certificate of
the execution
of the citation.

Church of Hereford aforesaid, and do here judicially produce his Lordship; and, as Proctor for the said Dean and Chapter, do exhibit an original mandate, together with a certificate thereupon endorsed, touching the execution of the said mandate, against all and singular opposers, and do pray they may be publicly called.

The certificate, endorsed on the mandate or citation (*supra*, p. 20), was as follows:—

“To the Most Reverend Father in God, William, by Divine Providence, Lord Archbishop of Canterbury, Primate of all England and Metropolitan, or to the Right Worshipful Sherrard Beaumont Burnaby, Doctor of Laws, your Vicar General and Official Principal; the Right Honourable Sir Herbert Jenner Fust, Knight, Doctor of Laws, Official Principal of your Arches Court of Canterbury; the Right Honourable Stephen Lushington, Doctor of Laws, Chancellor of the diocese of London; and the Right Worshipful Sir John Dodson, Knight, Doctor of Laws, Master of the Faculties; or to any or either of you; your humble and obedient James Barber, a literate person, your mandatory for executing the within written lawfully empowered, send all due reverence and obedience with honour. Your most Reverend Mandate on the other side written I have lately with all due reverence and obedience received, to be executed; by virtue and authority whereof I have peremptorily cited all and singular opposers, if any such there may be, as well in special as in general, who against the said election, mentioned on the other side, the manner thereof, or the person so elected, shall say against, except to, or oppose, as well as by affixing your said Mandate on the outward door of the parish church of Saint Mary-le-Bow, London, and thereon for some time left, as by publishing it in the parish church aforesaid, on Friday, the seventh day of January instant, that they and every of them appear on the day, hours, and place contained in that your most Reverend Mandate, if they think it concerns them, to contradict, except to, or oppose the said election, the manner thereof, or the person so elected: And further to do and receive what the tenor and effect of your said most Reverend Mandate demand and require of them. And moreover, on the aforesaid day, hours, and place, I did intimate to the aforesaid opposers, so cited as aforesaid, that if they would appear on the said day, hours, and place, and do as they were required or not, you nevertheless, or your aforesaid commissaries, some or one of them, will proceed and intend to proceed in the said business of confirmation, according to the exigency of the laws and statutes of this renowned realm, the absence or rather contumacy of the so cited, intimated, and not appearing in anywise notwithstanding. And thus I, your aforesaid mandatory, as much as in me lies, have duly and with all diligence executed this your most Reverend Mandate on the other side hereof. In witness whereof, I have procured an authentic Seal to be hereunto put. Dated, the tenth day of January in the year of our Lord, one thousand eight hundred and forty-eight.

“Same day, the said James
Barber was duly sworn to
the truth of the above.”

JAMES BARBER.

“Before me, S. B. BURNABY, Vicar General.” (L. s.)

THE VICAR GENERAL. Let the opposers be publicly called.

Confirmation of
Dr. Hampden.

The Apparitor General to the Archbishop of Canterbury (Mr. Barber) here advanced to the middle of the church, and proclaimed aloud as follows:—

“Oyez! Oyez! Oyez! All manner of persons who shall or will object to the confirmation of the election of the Reverend Renn Dickson Hampden, Doctor in Divinity, to be Bishop and Pastor of the Cathedral Church of Hereford, let them come forward, and make their objections in due form of law, and they shall be heard.”

First præconization.

Mr. Townsend. Right Worshipful Sir, I appear for the Rev. Richard Webster Huntley, Clerk, Vicar of Alberbury, in the county of Salop and diocese of Hereford, Master of Arts, of the University of Oxford; the Rev. John Jebb, Clerk, Rector of Peterstow, in the county and diocese of Hereford, Master of Arts, of Trinity College, Dublin; and the Rev. William Frederick Powell, Clerk, Perpetual Curate of Cirencester, in the county of Gloucester, Master of Arts, of the University of Cambridge, and exhibit proxies under their hands and seals respectively (*q*), and declare I oppose the confirmation of the election of Dr. Renn Dickson Hampden, Lord-elected of the office or dignity of Bishop of Hereford.

Appearance of
three opposers
by their proc-
tor.

THE VICAR GENERAL. What are your objections? Have you them in writing? We are acting here under a mandate from the Crown, issued pursuant to the provisions of the stat. of 25 Hen. 8,

* (*q*) The proxy from Mr. Huntley was as follows: those from the other two Opposers were similar, *mutatis mutandis*.

“Whereas the Reverend Doctor Renn Dickson Hampden, Clerk, hath been, howsoever, elected Lord of the Office or Dignity of Bishop of Hereford; and whereas the Confirmation of such Election is about to be or may be proceeded with, or attempted:

“Now know all men by these presents, that I, the Reverend Richard Webster Huntley, Clerk, Vicar of Alberbury in the county of Salop and diocese of Hereford aforesaid, for divers good causes and considerations me thereunto especially moving, do hereby nominate, constitute, and appoint Richard Edward Austin Townsend and Frederick Robarts, respectively, Notaries Public, two of the Procurators General Exercent in the Arches Court of Canterbury, jointly or severally, to be my true and lawful Proctors for me, and in my name to appear before His Grace the Lord Archbishop of Canterbury, the Worshipful Sherrard Beaumont Burnaby, Doctor of Laws, Vicar General of the Province of Canterbury, his Surrogate, or any other whomsoever before whom such Confirmation is about to be or

may be proceeded with or attempted; for me, and in my name, to oppose, in due form of law, such Confirmation as aforesaid, to give in and exhibit this my Proxy, and by virtue thereof to bring in a Libel, Allegation, or Articles touching and concerning the premises, and generally to do and perform, on my part and behalf, all such other acts, matters, and things as may be needful and expedient, and as Counsel should advise in the premises. And I do give and hereby grant unto my said Proctors or Proctor full power and authority to substitute one or more person or persons in their or his place and stead, if need shall be, and the same at pleasure to revoke and appoint anew. And I do hereby promise to ratify all that my said Proctors or Proctor, their or his substitutes or substitute, shall lawfully do or cause to be done in the premises, on my part and behalf, by virtue of these presents. In Witness whereof, I have hereto set my hand and seal this sixth day of January, 1848.

* Proxy from
Mr. Huntley.

“R. W. HUNTLEY. (L. s.)

“Signed, sealed, and delivered
in presence of us

“G. H. HUNTLEY,
“EDWARD PAGE.”

Confirmation of Dr. Hampden. c. 20 (r); and we conceive ourselves bound to comply without suffering any opposition, let, or hindrance.

(r) As, throughout the present case, the several clauses of this statute are frequently referred to, it is here given at length.

Stat. 25 Hen. 8, c. 20. "STAT. 25 HEN. 8, c. 20 (A. D. 1533).
"An Act for the Non-payment of First-fruits to the Bishop of Rome.

Stat. 23 Hen. 8, c. 20. "Where sithen the beginning of this present parliament, for repress of the exaction of annates and first-fruits of archbishopricks and bishopricks of this realm, wrongfully taken by the Bishop of Rome, otherwise called the Pope, and the see of Rome, it is ordained and established by an act, among other things, that the payments of the annates or first-fruits, and all manner contributions for the same, for any such archbishoprick or bishoprick, or for any bulls to be obtained from the see of Rome, to or for the said purpose or intent, should utterly cease, and no such to be paid for any archbishoprick or bishoprick within this realm, otherwise than in the same act is expressed; and that no manner of person or persons to be named, elected, presented, or postulated to any archbishoprick or bishoprick within this realm, should pay the said annates or first-fruits, nor any other manner of sum or sums of money, pensions, or annuities for the same, or for any other like exactions or cause, upon pain to forfeit to our sovereign lord the king, his heirs and successors, all manner his goods and chattels for ever, and all the temporal lands and possessions of the said archbishoprick or bishoprick during the time that he or they that should offend contrary to the said act, should have, possess, and enjoy the said archbishoprick or bishoprick. And it is further enacted, that if any person named or presented to the see of Rome by the King's highness, or his heirs or successors, to be bishop of any see or diocese within this realm, should happen to be letted, delayed, or deferred, at the see of Rome, from any such bishoprick whereunto he should be so presented, by mean of restraint or bulls of the said Bishop of Rome, otherwise called the Pope, and other things requisite to the same, or should be denied at the see of Rome, upon convenient suit made, for any bulls requisite for any such cause, that then every person so presented might or should be consecrated here in England by the arch-

bishop in whose province the said bishoprick shall be; so always, that the same person should be named and presented by the king for the time being to the said archbishop. And if any person being named and presented (as is aforesaid) to any archbishoprick of this realm, making convenient suit, as is aforesaid, should happen to be letted, delayed, deferred, or otherwise disturbed from the said archbishoprick, for lack of pall, bulls, or other things to him requisite to be obtained at the see of Rome, that then every such person so named and presented to the archbishop, might and should be consecrated and invested, after presentation made, as is aforesaid, by any other two bishops within this realm, whom the King's highness or any his heirs or successors, kings of England, would appoint and assign for the same, according and after like manner as divers archbishops and bishops have been heretofore in ancient time by sundry the King's most noble progenitors made, consecrated, and invested within this realm. And it is further enacted by the said act, that every archbishop and bishop, being named and presented by the King's highness, his heirs and successors, kings of England, and being consecrated and invested, as is aforesaid, shall be installed accordingly, and should be accepted, taken and reputed, used and obeyed, as an archbishop or bishop of the dignity, see, or place whereunto he shall be so named, presented, and consecrated, and as other like prelates of that province, see, or diocese, have been used, accepted, taken, and obeyed, which have had and obtained compleatly their bulls and other things requisite in that behalf from the see of Rome, and also should fully and entirely have and enjoy all the spiritualities and temporalities of the said archbishoprick or bishoprick, in as large, ample and beneficial manner, as any of his or their predecessors had or enjoyed in the said archbishoprick or bishoprick, satisfying and yielding unto the King's highness, and to his heirs and successors, all such duties, rights, and interests as before time hath been accustomed to be paid for any such archbishoprick or bishoprick, according to the ancient laws and customs of this realm and the king's prerogative royal, as in the said

Mr. Townsend. Right Worshipful, I bring in a libel—

DR. LUSHINGTON. No, you will not: you are not permitted to appear; and, Mr. Townsend, you know perfectly well, as an

Confirmation of
Dr. Hampden.

act amongst other things is more at large mentioned.

"II. And albeit the said Bishop of Rome, otherwise called the Pope, hath been informed and certified of the effectual contents of the said act, to the intent that by some gentle ways the said exactions might have been redressed and reformed, yet nevertheless the said Bishop of Rome hitherto hath made none answer of his mind therein to the King's highness, nor devised or required any reasonable ways to and with our said sovereign lord for the same: wherefore his most royal Majesty, of his most excellent goodness, for the wealth and profit of this his realm and subjects of the same, hath not only put his most gracious and royal assent to the foresaid act, but also hath ratified and confirmed the same, and every clause and article therein contained, as by his letters patents, under his great seal inrolled in the Parliament Roll of this present parliament, more at large is contained.

* "III. And forasmuch as in the said act it is not plainly and certainly expressed, in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated within this realm, and in all other the King's dominions, be it now therefore enacted by the King our sovereign lord, by the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that the said act and everything therein contained shall be and stand in strength, virtue, and effect; except only, that no person or persons hereafter shall be presented, nominated, or commended to the said Bishop of Rome, otherwise called the Pope, or to the see of Rome, to or for the dignity or office of any archbishop or bishop within this realm, or in any other the King's dominions, nor shall send nor procure there for any manner of bulls, breeves, palls, or other things requisite for an archbishop or bishop, nor shall pay any sums of money for annates, first-fruits, nor otherwise for expedition of any such bulls, breeves, or palls; but that by the authority of this act, such presenting, nominating, or commending to the said Bishop of Rome, or to the see of

Rome, and such bulls, breeves, palls, annates, first-fruits, and every other sums of money heretofore limited, accustomed, or used to be paid at the said see of Rome, for procuration or expedition of any such bulls, breeves, or palls, or other thing concerning the same, shall utterly cease and no longer be used within this realm, or within any the King's dominions; anything contained in the said act aforementioned, or any use, custom, or prescription to the contrary thereof notwithstanding."

"IV. And furthermore, be it ordained and established, by the authority aforesaid, that at every avoidance of every archbishoprick or bishoprick within this realm, or in any other the King's dominions, the King our sovereign lord, his heirs and successors, may grant to the prior and convent, or the dean and chapter of the cathedral churches or monasteries where the see of such archbishoprick or bishoprick shall happen to be void, a licence under the great seal, as of old time hath been accustomed, to proceed to election of an archbishop or bishop of the see so being void, with a letter missive containing the name of the person which they shall elect and choose: by virtue of which licence the said dean and chapter, or prior and convent, to whom any such licence and letters missive shall be directed, shall with all speed and celerity in due form elect and choose the same person named in the said letters missive, to the dignity and office of the archbishoprick or bishoprick so being void, and none other. And if they do defer or delay their election above twelve days next after such licence or letters missive to them delivered, that then for every such default the King's highness, his heirs and successors, at their liberty and pleasure, shall nominate and present, by their letters patents under their great seal, such a person to the said office and dignity so being void, as they shall think able and convenient for the same; and that every such nomination and presentment to be made by the King's highness, his heirs and successors, if it be to the office and dignity of a bishop, shall be made to the archbishop and

The manner of electing an archbishop or bishop, by the dean and chapter, &c.

* No man shall be presented to the see of Rome for the dignity of an archbishop or bishop, nor annates or first-fruits shall be paid to the same see.

For default of election by them, the king shall nominate a bishop by his letters patent.

Confirmation of Dr. Hampden. Ecclesiastical practitioner, that you are not able to bring in a libel until you are permitted to appear.

• The name of a bishop newly chosen, viz. a lord elect. The king's signification of the election of a bishop, or archbishop.

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metropolitan of the province where the see of the same bishoprick is void, if the see of the said archbishoprick be then full, and not void; and if it be void, then to be made to such archbishop or metropolitan within this realm, or in any the King's dominions, as shall please the King's highness, his heirs or successors: and if any such nomination or presentment, shall happen to be made for default of such election to the dignity or office of any archbishop, then the King's highness, his heirs and successors, by his letters patents under his great seal, shall nominate and present such person as they will dispose to have the said office and dignity of archbishoprick being void, to one such archbishop and two such bishops, or else to four such bishops within this realm, or in any the King's dominions, as shall be assigned by our said sovereign lord, his heirs or successors.

"V. And be it enacted, by the authority aforesaid, that whensoever any such presentment or nomination shall be made by the King's highness, his heirs or successors, by virtue and authority of this act, and according to the tenor of the same; that then every archbishop and bishop, to whose hands any such presentment and nomination shall be directed, shall with all speed and celerity invest and consecrate the person nominated and presented by the King's highness, his heirs or successors, to the office and dignity that such person shall be so presented unto, and give and use to him pall, and all other benedictions, ceremonies and things requisite for the same, without suing, procuring, or obtaining hereafter any bulls or other things at the see of Rome, for any such office or dignity in any behalf. And if the said dean and chapter, or prior and convent, after such licence

and letters missive to them directed, within the said twelve days do elect and choose the said person mentioned in the said letters missive, according to the request of the King's highness, his heirs or successors, thereof to be made by the said letters missive in that behalf, then their election shall stand good and effectual to all intents: * and that the person so elected, after certification made of the same election, under the common and convent seal of the electors, to the King's highness, his heirs or successors, shall be reputed and taken by the name of lord elected of the said dignity and office that he shall be elected unto; and then making such oath and fealty only to the King's majesty, his heirs and successors, as shall be appointed for the same, the King's highness, by his letters patents under his great seal, shall signify the said election, if it be to the dignity of a bishop, to the archbishop and metropolitan of the province where the see of the said bishoprick was void, if the see of the said archbishop be full and not void; and if it be void, then to any other archbishop within this realm, or in any other the King's dominions; requiring and commanding such archbishop, to whom any such signification shall be made, *to confirm the said election, and* † to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same, without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome for the same in any behalf. And if the person be elected to the office and dignity of an archbishop according to the tenor of this act, then after such election certified to the King's highness in form afore-

† *To confirm the said election, and*:—Mr. A. J. Stephens, in his recent *Treatise on the Laws relating to the Clergy* (p. 1399, *in not.*), observes that he "has recently examined the original roll of this statute [25 Hen. 8, c. 20], and the words '*to confirm the said election, and*' in sect. 5, and the word '*confirm*' in sect. 7 of this statute, are inserted by interlineation, having been introduced by amendment after the bill was engrossed, a fact which affords ground for contending, that the legislature attached importance to the act of confirmation, and therefore did not regard it as one of a mere ministerial character."

Dr. Addams. I appear for—

Dr. Bayford. I appear on behalf of the Dean and Chapter,

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said, the same person so elected to the office and dignity of an archbishop, shall be reputed and taken lord elect to the said office and dignity of archbishop, whereunto he shall be so elected; and then after he hath made such oath and fealty only to the King's majesty, his heirs and successors, as shall be limited for the same, the King's highness, by his letters patents under his great seal, shall signify the said election to one archbishop and two other bishops, or else to four bishops within this realm, or within any other the King's dominions, to be assigned by the King's highness, his heirs or successors, requiring and commanding the said archbishop and bishops, with all speed and celerity to *confirm the said election*, and* to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him such pall, benedictions, ceremonies, and all other things requisite for the same, without suing, procuring, or obtaining any bulls, briefs, or other things at the said see of Rome, or by the authority thereof in any behalf.

† "VI. And be it further enacted by authority aforesaid, that every person and persons being hereafter chosen, elected, nominate, presented, invested, and consecrate to the dignity or office of an archbishop or bishop within this realm, or within any other the King's dominions, according to the form, tenor, and effect of this present act, and suing their temporalities out of the king's hands, his heirs, or successors, as hath been accustomed, making a corporal oath to the king's highness, and to none other, in form as is afore rehearsed, shall and may from henceforth be thronised, or installed, as the case shall require, and shall have and take their only restitution out of the King's hands, of all the possessions and profits, spiritual and temporal, belonging to the said archbishoprick or bishoprick whereunto they shall be so elected or presented, and shall be obeyed in all manner of things, according to the name, title, degree, and dignity that they shall be so chosen or presented unto, and do and execute in every thing and things touching the

same, as any archbishop or bishop of this realm, without offending of the prerogative royal of the Crown, and the laws and customs of this realm, might at any time heretofore do.

"VII. And be it further enacted by the authority aforesaid, that if the prior and convent of any monastery, or dean and chapter of any cathedral church, where the see of any archbishop or bishop is within any the King's dominions, after such licence as is afore rehearsed, shall be delivered to them, proceed not to election, and signify the same according to the tenor of this act, within the space of twenty days next after such licence shall come to their hands; or else, if any archbishop or bishop within any the King's dominions, after any such election, nomination, or presentation shall be signified unto them by the King's letters patents, shall refuse, and do not *confirm*, ‡ invest, and consecrate with all due circumstance as is aforesaid, every such person as shall be so elected, nominate, or presented, and to them signified as is above mentioned, within twenty days next after the King's letters patents of such signification or presentation shall come to their hands; or else, if any of them, or any other person or persons, admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of due execution of this act; that then every prior and particular person of his convent, and every dean and particular person of the chapter, and every archbishop and bishop, and all other persons, so offending and doing contrary to this act, or any part thereof, and their aiders, counsellors, and abettors, shall run in the dangers, pains, and penalties of the statute of the provision and *præmunire*, made in the five and twentieth year of the reign of King Edward the Third, and in the sixteenth year of King Richard the Second."

Repealed by 1 & 2 Phil. & Mar. c. 8, but revived by 1 Eliz. c. 1. And see further, 31 Hen. 8, c. 9; 8 Eliz. c. 1; 23 Eliz. c. 1.

The penalty for not electing or not consecrating a bishop named. *Præmunire* as under stats. 25 Edw. 3, st. 5, c. 22, and 16 Rich. 2, c. 5.

† Such election of archbishops and bishops shall be lawful.

* See note, p. 28.

‡ *Confirm* :—See note, p. 28.

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and I object to my learned friend being heard at all. The Court refused to entertain the objection; and now my learned friend appears for nobody, and I do pray the Court will not allow him to proceed.

Dr. *Addams*. I appear, and beg to be heard; that is all.

THE VICAR GENERAL. What is it you wish to be heard upon?

Dr. *Addams*. Upon the statute.

THE VICAR GENERAL. You mean, whether you have a right to be heard or not?

Dr. *Addams*. Yes.

THE VICAR GENERAL. We confine you to that. You will not go beyond it.

Dr. *Addams*. Certainly not. I do not mean to address another word to the Court.

DR. LUSHINGTON. Distinctly understand to what you are confined, namely, the question whether, considering the statute of Henry 8, which has been referred to, you have a right, notwithstanding that statute, to be heard at all?

Dr. *Addams*. Precisely.

THE VICAR GENERAL. Merely a question as to your right to appear.

Dr. *Addams*. Precisely. I am perfectly aware of the point upon which I am called upon to address the Court. I will confine my observations to that, and that only. I did not expect that any objection would be taken to my being heard upon that point; however I undertake to satisfy the Court, unless I am entirely mistaken as to the true construction of that statute, that that has nothing whatever to do with the present question; and certainly I shall be exceedingly surprised if the ultimate decision of this Court is, that it is incompetent to it to entertain this objection to the present confirmation of the Lord Bishop elect of Hereford, by reason of the provisions of that statute; and, after considering the true construction of that statute, I shall be surprised indeed, if this Court declines to entertain the objections being raised here, under the supposition that, by so doing, it will fall within the penalty of *præmunire*.

Dr. *Bayford*. I must beg leave again to interfere: I oppose this discussion proceeding.

Dr. *Addams*. I know my learned friend's pugnacity.

Dr. *Bayford*. I hope you will not interrupt me. My learned friend is standing here, offering an argument for nobody—no party before the Court—the Court having already declared it will hear no opposers.

DR. LUSHINGTON. No. The Court has declared this, that it would not proceed with Mr. Townsend, when he offered to appear for certain parties. Dr. *Addams* claims to urge a point, as to whether he may be heard or not; and we are content to hear him.

Dr. *Addams*'s
argument.

Dr. *Addams*. I pledge myself to confine my observations to that question, and not to say one word as to the merits of the case.

In order to make it intelligible, it is necessary to say a word or two as to the history and introduction of this statute.

It is perfectly well known that bishopricks were anciently donative,

by the mere conveyance of the ring and pastoral staff; afterwards (I am stating it very briefly, because I am endeavouring to put what I have to say in the fewest possible words), the election by the chapter was supposed to be a free election, and founded upon the *Congé d'élire*. But it was agreed that the confirmation of the bishop belonged to the Pope; and, by that means, the Pope had, in effect, the disposal of all the bishopricks of England. This will be found laid down in the first Institute, page 134. Now the Popes were not contented with that; they were not contented with merely the confirmation and consecration, but they insisted, on various occasions, upon collating or nominating; and that produced the first enactment particularly upon the subject, which is the 25th Edward 3, stat. 6. Now that statute (which I cite from a book of the most convenient form, that is to say, from Burn(r)), is in these words—"The free election of archbishops, bishops, and all other dignities and benefices elective in England, shall hold from henceforth in the manner as they were granted by the king's progenitors and the ancestors of other lords, founders of the said dignities and other benefices. And in case that reservation, collation, or provision be made by the court of Rome, of any archbishoprick, bishoprick, dignity, or other benefice, in disturbance of the free elections aforesaid, the king shall have for that time the collations to the archbishopricks and other dignities elective which be of his advowry, such as his progenitors had before that free election was granted; since that the election was first granted by the king's progenitors upon a certain form and condition as to demand licence from the king to choose, and after the election to have his royal assent, and not in other manner; which conditions not kept, the thing ought by reason to resort to its first nature."

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Now that was the first act against the usurpation of the Pope, to nominate the bishops. So the matter stood until Henry the 8th's reign; and then, (in the reign of Henry 8), in the first place, there was the statute against annates, which is not printed in the statute book, but which is printed in various places, and particularly in the Appendix to the first Volume of Burnet's History of the Reformation(s). Now that statute, which is also the

(r) 1 Burn, E. L. 201.

(s) Vol. 1, part 2, p. 160, (ed. Oxford, 1816). • The statute is as follows:

STAT. 23 HEN. 8, c. 20 (A. D. 1531).
"An Act concerning Restraint of Payment of Annates to the See of Rome.
"Forasmuch as it is well perceived, by long approved experience, that great and inestimable sums of money have been daily conveyed out of this realm, to the impoverishment of the same; and especially such sums of money as the Pope's holiness, his predecessors, and the court of Rome, by long time have heretofore taken of all and singular those spiritual persons which have been named, elected, presented, or postulated to be archbishops or bishops within this realm of England,

under the title of Annates, otherwise called First-fruits. Which annates, or first-fruits, have been taken of every archbishoprick, or bishoprick, within this realm, by restraint of the Pope's bulls, for confirmations, elections, admissions, postulations, provisions, collations, dispositions, institutions, installations, investitures, orders, holy benedictions, palls, or other things requisite and necessary to the attaining of those their promotions; and have been compelled to pay, before they could attain the same, great sums of money, before they might receive any part of the fruits of the said archbishoprick, or bishoprick, whereunto they were named, elected, presented, or postulated; by occasion whereof, not only the treasure of this realm hath

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foundation of the act of the 25th of Hen. 8, was the 23rd of Hen. 8 ; and in point of fact it was the immediate predecessor of the act which is now under consideration. The preamble of the act is

been greatly conveyed out of the same, but also it hath happened many times, by occasion of death, unto such archbishops, and bishops, so newly promoted, within two or three years after his or their consecration, that his or their friends, by whom he or they have been holpen to advance and make payment of the said annates, or first-fruits, have been thereby utterly undone and impoverished. And for because the said annates have risen, grown, and increased, by an uncharitable custom, grounded upon no just or good title, and the payments thereof obtained by restraint of bulls, until the same annates, or first-fruits, have been paid, or surety made for the same ; which declareth the said payments to be exacted, and taken by constraint, against all equity and justice. The noble men therefore of the realm, and the wise, sage, politick commons of the same, assembled in this present Parliament, considering that the court of Rome ceaseth not to tax, take, and exact the said great sums of money, under the title of annates, or first-fruits, as is aforesaid, to the great damage of the said prelates, and this realm ; which annates, or first-fruits, were first suffered to be taken within the same realm, for the only defence of Christian people against the infidels, and now they be claimed and demanded as mere duty, only for luere, against all right and conscience. Inasmuch that it is evidently known, that there hath passed out of this realm, unto the court of Rome, sithen the second year of the reign of the most noble prince, of famous memory, King Henry the Seventh, unto this present time, under the name of annates, or first-fruits, paid for the expedition of bulls of archbishopricks and bishopricks, the sum of eight hundred thousand ducats, amounting in sterling money, at the least, to eight score thousand pounds, besides other great and intolerable sums which have yearly been conveyed to the said court of Rome, by many other ways and means, to the great impoverishment of this realm. And albeit, that our said sovereign the King, and all his natural subjects, as well spiritual as temporal, being as obedient, devout, catholick, and humble children

of God, and holy church, as any people be within any realm christened ; yet the said exactions of annates, or first-fruits, be so intolerable and importable to this realm, that it is considered and declared, by the whole body of this realm now represented by all the estates of the same assembled in this present Parliament, that the King's highness, before Almighty God, is bound, as by the duty of a good Christian prince, for the conservation and preservation of the good estate and common wealth of this his realm, to do all that in him is to obviate, repress, and redress the said abusions and exactions of annates, or first-fruits. And because that divers prelates of this realm, being now in extreme age, and in other debilities of their bodies, so that of likelihood, bodily death in short time shall or may succeed unto them ; by reason whereof great sums of money shall shortly after their deaths be conveyed unto the court of Rome, for the unreasonable and uncharitable causes abovesaid, to the universal damage, prejudice, and impoverishment of this realm, if speedy remedy be not in due time provided :

" II. It is therefore ordained, established, and enacted, by authority of this present Parliament, that the unlawful payment of annates, or first-fruits, and all manner contributions for the same, for any archbishoprick or bishoprick, or for any bulls hereafter to be obtained from the Court of Rome, to or for the foresaid purpose and intent, shall from henceforth utterly cease, and no such hereafter to be payed for any archbishoprick, or bishoprick, within this realm, other or otherwise than hereafter in this present act is declared : and that no manner of person, or persons hereafter to be named, elected, presented, or postulated to any archbishoprick, or bishoprick, within this realm, shall pay the said annates, or first-fruits, for the said archbishoprick, or bishoprick, nor any other manner of sum or sums of money, pensions or annates for the same, or for any other like exaction, or cause, upon pain to forfeit to our said sovereign lord the King, his heirs and successors, all manner his goods and chattels for ever, and all the temporal

this:—"Forasmuch as it is well perceived, by long approved experience, that great and inestimable sums of money have been daily conveyed out of this realm, to the impoverishment of the same;

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lands and possessions of the same archbishoprick, or bishoprick, during the time that he or they which shall offend, contrary to this present act, shall have, possess, or enjoy, the archbishoprick, or bishoprick, wherefore he shall so offend contrary to the form aforesaid. And furthermore it is enacted, by authority of this present parliament, that if any person hereafter named and presented to the Court of Rome by the King, or any of his heirs or successors, to be bishop of any see or diocese within this realm hereafter, shall be letted, deferred, or delayed at the court of Rome from any such bishoprick, whereunto he shall be so represented, by means of restraint of bulls apostolick, and other things requisite to the same; or shall be denied, at the court of Rome, upon convenient suit made, any manner bulls requisite for any of the causes aforesaid, any such person or persons so presented may be, and shall be, consecrated here in England by the archbishop, in whose province the said bishoprick shall be, so away that the same person shall be named and presented by the King for the time being to the same archbishop: and if any person being named and presented, as aforesaid, to any archbishoprick of this realm, making convenient suit, as is aforesaid, shall happen to be letted, deferred, delayed, or otherwise disturbed from the same archbishoprick, for lack of pall, bulls, or other to him requisite, to be obtained in the court of Rome in that behalf, that then every such person named and presented to be archbishop, may be, and shall be, consecrated and invested, after presentation made, as is aforesaid, by any other two bishops within this realm, whom the King's highness, or any of his heirs or successors, Kings of England for the time being, will assign and appoint for the same, according and in like manner as divers other archbishops and bishops have been heretofore, in ancient time, by sundry the King's most noble progenitors, made, consecrated, and invested within this realm; and that every archbishop and bishop hereafter, being named and presented by the King's highness, his heirs or successors, Kings of England, and being consecrated and invested, as is aforesaid,

shall be installed accordingly, and shall be accepted, taken, reputed, used, and obeyed, as an archbishop or bishop of the dignity, see, or place whereunto he so shall be named, presented, and consecrated, requireth; and as other like prelates of that province, see, or diocese have been used, accepted, taken, and obeyed, which have had, and obtained completely, their bulls, and other things requisite in that behalf from the court of Rome. And also shall fully and entirely have and enjoy all the spiritualities and temporalities of the said archbishoprick, or bishoprick, in as large, ample, and beneficial manner as any of his or their predecessors had or enjoyed in the said archbishoprick, or bishoprick, satisfying and yielding unto the King our sovereign lord, and to his heirs and successors, Kings of England, all such duties, rights, and interests, as before this time had been accustomed to be paid for any such archbishoprick, or bishoprick, according to the ancient laws and customs of this realm, and the King's prerogative royal.

"III. And to the intent our said holy father the Pope, and the court of Rome, shall not think that the pains and labours taken, and hereafter to be taken, about the writing, sealing, obtaining, and other business sustained, and hereafter to be sustained, by the offices of the said court of Rome, for and about the expedition of any bulls hereafter to be obtained or had for any such archbishoprick, or bishoprick, shall be irremunerated, or shall not be sufficiently and condignly recompensed in that behalf; and for their more ready expedition to be had therein. It is therefore enacted by the authority aforesaid, that every spiritual person of this realm, hereafter to be named, presented, or postulated, to any archbishoprick or bishoprick of this realm, shall and may lawfully pay for the writing and obtaining of his or their said bulls, at the court of Rome, and ensealing the same with lead, to be had without payment of any annates, or first-fruits, or other charge or exaction by him or them to be made, yielded, or paid for the same, five pounds sterling, for and after the rate of the clear and whole yearly value of every hundred pounds sterli-

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and especially such sums of money as the Pope's Holiness, his predecessors, and the court of Rome, by long time, have heretofore taken of all and singular those spiritual persons which have been

ing, above all charges of any such archbishoprick, or bishoprick, or other money, to the value of the said five pounds, for the clear yearly value of every hundreth pounds of every such archbishoprick, or bishoprick, and not above, nor in any otherwise, anything in this present act before written notwithstanding. And forasmuch as the King's highness, and this his high court of parliament, neither have, nor do intend to use in this, or any other like cause, any manner of extremity or violence, before gentle courtesy or friendship, ways and means first approved and attempted, and without a very great urgent cause and occasion given to the contrary, but principally coveting to disburden this realm of the said great exactions and intolerable charges of annates, and first-fruits, have therefore thought convenient to commit the final order and determination of the premises, in all things, unto the King's highness. So that if it may seem to his high wisdom, and most prudent discretion, meet to move the Pope's holiness, and the court of Rome, amicably, charitably, and reasonably, to compound, other to extinct and make frustrate the payments of the said annates, or first-fruits, or else by some friendly, loving, and tolerable composition, to moderate the same in such wise as may be by this realm easily borne and sustained; that then those ways and compositions once taken, concluded, and agreed between the Pope's holiness and the King's highness, shall stand in strength, force, and effect of law, inviolably to be observed. And it is also further ordained, and enacted by the authority of this present Parliament, that the King's highness at any time, or times, on this side the feast of Easter, which shall be in the year of our Lord God, a thousand five hundred and three and thirty, or at any time on this side the beginning of the next parliament, by his letters patents under his great seal, to be made, and to be entered of record in the roll of this present parliament, may and shall have full power and liberty to declare, by the said letters patents, whether that the premises, or any part, clause, or matter thereof,

shall be observed, obeyed, executed, and take place and effect, as an act and statute of this present parliament or not. So that if his highness, by his said letters patents, before the expiration of the times above limited, thereby do declare his pleasure to be, that the premises, or any part, clause, or matter thereof, shall not be put in execution, observed, continued, nor obeyed, in that case all the said premises, or such part, clause, or matter, as the King's highness so shall refuse, disaffirm, or not ratify, shall stand and be from henceforth utterly void and of none effect. And in case that the King's highness, before the expiration of the times afore prefixed, do declare, by his said letters patents, his pleasure and determination to be, that the said premises, or every clause, sentence, and part thereof, that is to say, the whole, or such part thereof as the King's highness so shall affirm, accept, and ratify, shall in all points stand, remain, abide, and be put in due and effectual execution, according to the purport, tenour, effect, and true meaning of the same; and to stand and be from henceforth for ever after, as firm, stedfast, and available in the law, as the same had been fully and perfectly established, enacted, and confirmed, to be in every part thereof, immediately, wholly, and entirely executed, in like manner, form, and effect, as other acts and laws; the which being fully and determinately made, ordained, and enacted in this present parliament: and if that upon the aforesaid reasonable, amicable and charitable ways and means by the King's highness to be experimented, moved, or compounded, or otherwise approved, it shall and may appear, or be seen unto his Grace, that this realm shall be continually burdened and charged with this, and such other intolerable exactions and demands, as heretofore it hath been. And that thereupon, for continuance of the same, our said holy father the Pope, or any of his successors, or the court of Rome, will, or do, or cause to be done at any time hereafter, so as is above rehearsed, unjustly, uncharitably, and unreasonably vex, inquiet, molest, trouble, or grieve our

named, elected, presented, or postulated to the archbishops or bishops within this realm of England, under the title of annates, otherwise called first-fruits, which annates or first-fruits have been taken of every archbishoprick or bishoprick within this realm, by restraint of the Pope's bulls, for confirmations, elections, admissions, postulations, provisions, collations, dispositions, institutions, installations, investitures, orders; holy benedictions, palls, or other things requisite and necessary to the attaining of those their promotions, and have been compelled to pay, before they could attain the same, great sums of money.... And for because the same annates have risen, grown, and increased, by an uncharitable custom, grounded upon no just or good title, and the payments thereof obtained by restraint of bulls until the same annates, or first-fruits, have been paid, or surety made for the same; which declareth the said payments to be exacted and taken by constraint, against all equity and justice." Then follow certain provisions against these annates, and all such payments. And then follows this,—“that no person shall pay them, and if any person is denied his bulls at the court of Rome, he should be consecrated by his archbishop, being first named by the King; “as divers other archbishops and bishops have been heretofore in ancient time, by sundry the King's most noble progenitors, made, consecrated, and invested, within this realm:” after which he shall be bishop or archbishop of the see. This was the act, the immediate predecessor of the act in question. It was, in point of fact, as all these statutes are, made against the usurpation of the Papal See. Now, at the time of the passing of this act, it was the very commencement of the Reformation. In point of fact, it was something of an intermediate statute. The Papal authority was not altogether annulled. On the contrary, the Pope is styled, in that very act, “His Holiness;” and the conclusion of that statute is, if the Pope will moderate his demands, and not exact to the extent which has been exacted formerly, that the payment, to a certain extent, and in a certain way, may continue. It is clear that it is so; and Burnet says this: “In

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said sovereign lord, his heirs or successors, kings of England, or any of his or their spiritual or lay subjects, or this his realm, by excommunication, excommungement, interdiction; or by any other process, censures, compulsories, ways or means; be it enacted by the authority aforesaid, that the King's highness, his heirs and successors, kings of England, and all his spiritual and lay subjects of the same, without any scruples of conscience, shall and may lawfully, to the honour of Almighty God, the increase and continuance of virtue and good example within this realm, the said censures, excommunications, interdictions, compulsories, or any of them notwithstanding, minister, or cause to be ministered, throughout this realm, and all other the dominions or ter-

ritories belonging or appertaining thereunto: all and all manner of sacraments, sacramentals, ceremonies, or other divine services of the holy Church, or any other thing or things necessary for the health of the soul of mankind, as they heretofore at any time or times have been virtuously used or accustomed to do within the same; and that no manner such censures, excommunications, interdictions, or any other process or compulsories, shall be by any of the prelates, or other spiritual fathers of this religion, nor by any of their ministers or substitutes, be at any time or times hereafter published, executed, nor divulged, nor suffered to be published, executed, or divulged in any manner of ways.”

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this parliament, the foundation of the breach that afterwards followed with Rome was laid by an act restraining the payment of annates" (*t*). He then gives the substance of it, and he refers to the record where the statute itself is published; and I only turn to it now, to show, that clearly at this time the jurisdiction of the Pope, in these matters, was not altogether denied, because he is styled "His Holiness" in this statute; and there is a letter, immediately following this statute, in the year after, from King Henry 8, which commences in this way: "After most humble commendations, and most devout kissing of your blessed feet." (*u*) And after this again, and notwithstanding this act against annates, when Archbishop Cranmer came to be confirmed and consecrated Archbishop of Canterbury, the bulls for that consecration were obtained from Rome. And therefore, this was a sort of inchoate measure, and was not carried out.

In order to show that this was so, and to show what the exactions of the Pope of Rome were, I will state to your worships, from the same book, page 128 (*v*), what the several bulls were which were obtained from Rome for the promotion of Archbishop Cranmer. It will be recollected that, at this time, the situation, of Archbishop Cranmer was this: he had been instrumental, at that time, in obtaining the opinions of the different universities against the validity of the marriage of Henry 8, with Catherine of Arragon. Though the sentence, annulling that marriage, had not been pronounced, he was in ill favour with the Court of Rome, but had not entirely broken with it, nor had Hen. 8; and therefore the bulls for the consecration of Archbishop Cranmer were obtained from Rome notwithstanding this act. Now Burnet in stating this says:—"In the end of January, the King sent to the Pope for the bulls for Cranmer's promotion; and though the statutes were passed against procuring more bulls from Rome, yet the King resolved not to begin the breach, till he was forced to it by the Pope. It may easily be imagined, that the Pope was not hearty in his promotion, and that he apprehended ill consequences from the advancement of a man, who had gone over many courts of Christendom, disputing against his power of dispensing, and had lived in much familiarity with Osiander and the Lutherans in Germany: yet, on the other hand, he had no mind to precipitate a rupture with England; therefore he consented to it, and the bulls were expedited, though instead of *annates*, there was only nine hundred ducats paid for them.

"They were the last bulls that were received in England in this King's reign; and therefore I shall give an account of them, as they are set down in the beginning of Cranmer's Register. By one bull he is, upon the King's nomination, promoted to be Archbishop of Canterbury, which is directed to the King. By a second, directed to himself, he is made archbishop. By a third, he is absolved from all censures. A fourth is to the suffragans. A fifth to the dean and chapter. A sixth to the clergy of Canterbury. A seventh to all the laity in his see. An eighth to all that held lands of it, requiring

(*t*) Vol. 1, part 1, p. 214.

(*u*) Ibid. part 2, p. 167.

(*v*) p. 234, Oxford ed. of 1816.

them to receive and acknowledge him as Archbishop. All these bear date the twenty-first of February, 1533. By a ninth bull, dated the twenty-second of February, he was ordained to be consecrated, taking the oath that was in the Pontifical. By a tenth bull, dated the second of March, the pall was sent him. And by an eleventh of the same date, the Archbishop of York and the Bishop of London were required to put it on him."

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These were the two processes that were to be gone through, as to the confirmation and consecration of the bishops at that time; and they were also employed in the consecration of Archbishop Cranmer.

He concludes:—"These were the several artifices to make compositions high, and to enrich the Apostolical Chamber; for now, that, about which St. Peter gloried that he had none of it (neither silver nor gold,) was the thing in the world for which his successors were most careful."

Now, immediately after the consecration of Archbishop Cranmer, it is well known, there was a sentence of divorce; and following upon that, was the final breach between Henry 8 and the Pope, which was declared by a statute which prohibited all appeals to the court of Rome (*w*), under the penalties of *præmunire*. And then followed the statute, the construction of which is the matter now in hand. And when that comes to be considered, it is perfectly obvious, that it is quite out of the question, that your worships, by entertaining these objections to the present confirmation, can incur the penalty of *præmunire*; and I am at a loss to conceive how such a proposition should be entertained.

This act, now under consideration is the 25 Hen. 8, c. 20; and the preamble recites that act condemning the annates (the 23 Hen. 8, c. 20), and then goes on, in the 3rd section, to provide in this way:—"And forasmuch as, in the said act, it is not plainly and certainly expressed, in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated, within this realm, and in all other the King's dominions; be it now therefore enacted, by the King our Sovereign Lord, by the assent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, that the said act, and every thing therein contained, shall be and stand in strength, virtue, and effect; except only, that no person or persons hereafter shall be presented, nominated, or commended to the said Bishop of Rome, otherwise called the Pope, or to the See of Rome, to or for the dignity or office of any archbishop or bishop, within this realm, or in any other the King's dominions, nor shall send nor procure there for any manner of bulls, breves, palls, or other things requisite for an archbishop or bishop, nor shall pay any sums of money for annates, first-fruits, nor otherwise for expedition of any such bulls, breves, or palls." Immediately before, these had been applied for, in the instance of Archbishop Cranmer.

THE VICAR GENERAL. Before the passing of this statute?

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Dr. *Addams*. Before the passing of this statute. But now, nothing of that sort is to be. The act is to stand in all other respects, but that part of it is to be repealed.—“Except only, that no person or persons hereafter shall be presented, nominated, or commended to the said Bishop of Rome, otherwise called the Pope, or to the See of Rome, to or for the dignity or office of any archbishop or bishop, within this realm, or in any other the King's dominions, nor shall send nor procure there for any manner of bulls, breves, palls, or other things requisite for an archbishop or bishop, nor shall pay any sums of money for annates, first-fruits, nor otherwise for expedition of such bulls, breves, or palls.”

Then the 4th section states the manner of the election of an archbishop or bishop. “And furthermore, be it ordained and established by the authority aforesaid, That at every avoidance of every archbishoprick or bishoprick within this realm, or in any other the King's dominions, the King, our Sovereign Lord, his heirs and successors, may grant to the prior and convent”—(this was before the monasteries were abolished—“may grant to the prior and convent), or the dean and chapter of the cathedral churches or monasteries, where the see of such archbishoprick or bishoprick shall happen to be void, a licence under the Great Seal, as of old time hath been accustomed, to proceed to election of an archbishop or bishop of the see so being void, with a letter missive, containing the name of the person which they shall elect and choose: by virtue of which licence, the said dean and chapter, or prior or convent, to whom any such licence and letters missive shall be directed, shall, with all speed and celerity, in due form, elect and choose the same person named in the said letters missive, to the dignity and office of the archbishoprick or bishoprick so being void, and none other.”

And then follows this consequence,—which I beg your worships to observe, because I shall found upon it an observation presently,—that, for default of election, if they do not “proceed to an election” at all, (that is the construction of the act),—for default of election for twelve days, what is to be the consequence? That they incur the penalty of *præmunire*? No such thing: I will satisfy your worships that they do not incur any penalty. If they do not elect, and so prevent the due execution of the act, the consequence is, the King shall nominate the bishop by his letters patent. That is all: there is no penalty incurred. So much for the confirmation. Now we come to the consecration.

“And be it enacted by the authority aforesaid, That whensoever any such presentment or nomination shall be made by the King's Highness, his heirs or successors, by virtue and authority of this act, and according to the tenor of the same, that then every archbishop and bishop to whose hands any such presentment and nomination shall be directed shall, with all speed and celerity, invest and consecrate.” There is to be no confirmation in this case, you will be pleased to observe; but the archbishop, in the case of the *nomination* of a bishop, shall proceed to “invest and consecrate the person nominate and presented by the King's Highness, his heirs or successors, to the office and dignity that such person shall be so

presented unto, and give and use to him pall and all other benedictions, ceremonies, and things requisite for the same, without suing, procuring, or obtaining hereafter any bulls or other things at the See of Rome, for any such office or dignity in that behalf" (x). They are to make no application to Rome, they are to proceed to invest and consecrate, and not to use breves, or bulls, or any thing of that kind, nor to call upon the Pope for investment and consecration.

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Now we come to what is to be done on an election.

"And if the said dean and chapter, or prior and convent, after such licence and letters missive to them directed, within the said twelve days, do elect and choose the said person mentioned in the said letters missive, according to the request of the King's Highness, his heirs or successors, thereof to be made by the said letters missive in that behalf, then their election shall stand good and effectual to all intents;"—if they do elect, that election is to stand good, to all intents and purposes; if they do not elect, they do not incur any penalty of *præmunire*, but the King shall nominate;—"and the person so elected, after certification of the same election, under the common and convent seal of the electors to the King's Highness, his heirs or successors, shall be reputed and taken by the name of Lord elected of the said dignity and office, that he shall be elected unto; and then, making such oath and fealty only to the King's Majesty, his heirs, and successors, as shall be appointed for the same"—(previously there were two oaths, one to the Pope, and the other to the King, one of which was considered to militate against the other)—"as shall be appointed for the same, the King's Highness, by his letters patents, under his Great Seal, shall signify the said election, if it be to the dignity of a bishop, to the Archbishop and Metropolitan of the province, where the see of the said bishoprick was void, if the see of the said Archbishop be full and not void; and if it be void, then to any other archbishop within this realm, or in any other the King's dominions; requiring and commanding such archbishop, to whom any such signification shall be made, to confirm the said election,"—(in case of an election, there is to be a confirmation)—"requiring and commanding such Archbishop, to whom any such signification shall be made, to confirm the said election, and to invest and consecrate the said person"—(so there is a double proceeding here)—"so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same, without any suing, procuring, or obtaining any bulls, letters, or other things from the See of Rome for the same, in any behalf"(y).

Well then, the 6th section is, that the election of the bishop shall be lawful. And now follows the 7th; upon which, strange to say, it is supposed that your worships, by entertaining this objection, will incur the penalty of *præmunire*. I call your attention to the 7th section of the 25th of Hen. 8.

"And be it further enacted, by the authority aforesaid, that if the prior and convent of any monastery, or dean and chapter of any

(x) Sect. 5.

(y) Sect. 5.

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cathedral church, where the see of an archbishop or bishop is within any the King's dominions, after such licence as is afore rehearsed shall be delivered to them, proceed not to election, and signify the same according to the tenor of this act, within the space of twenty days next after such licence shall come to their hands,"—

Dr. LUSHINGTON. Is it "to election," or "to their election?"

Dr. Addams. "To election." "And proceed not to election, and signify the same according to the tenor of this act, within the space of twenty days next after such licence shall come to their hands;"—what penalty do they incur? The penalty of *præmunire*. Now this entirely explains the distinction which is manifest throughout the act. If they proceed to an election within *twelve* days; supposing they do not choose the person named in the letters missive, supposing they come to no election at all, or supposing they choose another person than the person named in the letters missive,—what is the penalty? Why, they elect him contrary to the act; but the penalty is not *præmunire*; the consequence is, that the Crown nominates and presents. But if they do not proceed to an election at all, within the space of *twenty* days, they incur the penalty of *præmunire*. What is *præmunire*? What is the meaning of the term *præmunire*? I shall show to your worships that *præmunire* means setting up of the Papal in derogation to the Royal authority: that is the meaning of *præmunire*; and that is the penalty. If they refuse to come to an election at all, considering whatever has been done to the prejudice of the See of Rome null and void, and they choose to prefer obedience to the Pope to allegiance to their own Sovereign, they incur the penalty of *præmunire*. And unless you are satisfied that, by entertaining these objections, you are setting up a Papal authority in derogation of that of the Queen, the penalties of *præmunire* are entirely fanciful, and have no more to do with this question, than if the statute had never been passed. Now let us see how it proceeds.

So much, if the dean and chapter do not proceed to an election within twenty days, do not proceed to an election at all—refuse, wilfully refuse, to proceed to an election, with reference to this, that they will obey the Pope rather than the King. Then it goes on thus:—"or else if any archbishop or bishop within any the King's dominions, after any such election, nomination, or presentation shall be signified unto them by the King's letters patents, shall refuse, and do not confirm, invest, and consecrate, with all due circumstance, as is aforesaid, every such person as shall be so elected, nominate, or presented, and to them signified as is above mentioned, within twenty days next after the King's letters patents of such signification or presentation shall come to their hands; or else if any of them or any other person or persons"—including, your worships, *any other person or persons*—"admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of due execution of this act; that then every prior, and particular persons of his convent, and every dean and particular person of the chapter, and every archbishop and bishop, and all other persons, so offending and

doing contrary to this act, or any part thereof, and their aiders, counsellors and abettors, shall run in the dangers and penalties of the statute of the provision and *præmunire*.”

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Now I have already said, that *præmunire* is the offence of maintaining Papal patronage and usurpation, in opposition to that of the Crown. Your worships know very well, amongst other usurpations by the court of Rome, one was that of granting bishopricks or benefices, (ecclesiastical benefices), by anticipation,—by *provisions*, as they were called. They were granted in the lifetime of the former incumbent, by a sort of anticipation of those grants, to take effect in the event of the death of the person then holding; and they were called provisions. And from that term, any usurpations of patronage by the court of Rome were called provisions; and there were various statutes, commencing with the 25 Ed. 3 (z), which was called the statute of *Provisors*; and then follow various statutes between that statute of the 25 Ed. 3, and the statute of the 16 Rich. 2, called the statute of *Præmunire*. Now, that statute of *Præmunire*—the statute of 16 Rich. 2, c. 5, (which the Pope called *execrabile statutum*, and the passing thereof *scdum et turpe facinus*), enacted, “that if any do purchase or pursue, or cause to be purchased or pursued, in the court of Rome, or elsewhere, any such translations (*i. e.* of prelates), processes, and sentences of excommunications, bulls, instruments, or any other thing whatever, which toucheth our Lord the King, against him, his Crown, and regality, or his realm,...and they which bring the same within the realm, or receive them, or make thereof notification, or any other execution whatever within the said realm or without, that they, their notaries, procurators, maintainers, abettors, fautors, and counsellors, shall be put out of the King's protection, and their lands and tenements, goods and chattels, forfeit to our Lord the King; and that they be attached by their bodies, if they may be found, and brought before the King and this council, there to answer to the cases aforesaid; or that process be made against them by *præmunire facias*, in manner as it is ordained in other statutes concerning provisors, and others which do sue in the court of any other, in derogation of the regality of our Lord the King.”

Now your worships will understand, that persons who offended against these statutes were cited to answer by a writ, which commenced with these words “*præmunire facias*,” (*præmunire* being supposed to be a barbarous word for *præmoneri*); and then the offence itself came to be called by the name of the writ, or the first words of the writ; but the offence of *præmunire*, I repeat, is the offence of maintaining the Papal usurpations in derogation of the authority of the Crown; and the penalties of *præmunire* cannot be incurred in any other way; except by some particular statutes, where, to be sure, the penalties of *præmunire* are expressed against offences which have nothing to do with the offence of *præmunire*, as in the case of assisting in the illegal marriage of any of the Royal family. But the original offence is what I have stated, and it is quite manifest from the whole tenor of that act; and of this, I am

(z) 25 Ed. 3, stat. 6, See also 27 Ed. 3, stat. 1.

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convinced, nobody can entertain a moment's doubt. The only possible manner by which the penalty of *præmunire* is to be incurred under the 25th Hen. 8, would be something done in defiance of or contrary to that act, whereby the Papal authority is set up, in derogation of the authority of the Crown. I say, no doubt can be entertained of that; and if there were no case in point, that would be the just result from looking at the statute itself. But that such has been the construction of the statute, ever since it passed, I can satisfy you, by the only precedents; and these are all one way.

From the time of the passing of this act of the 25th Hen. 8, we have no exact intimation, that I am aware of, during the same reign, how bishops were elected, and confirmed, and consecrated; but I presume they were elected, confirmed, and consecrated, pursuant to the tenor of that act. I have no doubt the fact was so.

During the reign of Ed. 6, there are no precedents, because in the first year of his reign, an act passed by which all this process was abolished, and all archbishops and bishops were made donative by letters patent (a); and all bishops in this reign were so appointed. Barlow was the first, and Harley was the last; Barlow in the

(a) 1 Ed. 6, c. 2, (afterwards repealed by stat. 1 Mar. sess. 2, c. 2). It is not printed in the ordinary editions of the statutes. The first two sections (all that relate to the present subject), are as follows:—

“Forasmuch as the elections of archbishops and bishops by the deans and chapters within the King's Majesty's realms of England and Ireland, at this present time, be as well to the long delay, as to the great cost and charges of such persons as the King's Majesty giveth any archbishoprick or bishoprick unto: And whereas the said elections be, in very deed, no elections, but only by a writ of *Congé d'élire*, have colours, shadows, and pretences of elections, serving nevertheless to no purpose, and seeming also derogatory and prejudicial to the King's prerogative royal, to whom only appertaineth the collation and gift of all archbishopricks and bishopricks, and suffragan bishops within his Highness said realms of England and Ireland, Wales, and other his dominions and marches: for a due reformation hereof, be it therefore enacted by the King's Highness, with the assent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, That from henceforth, no *Congé d'élire* be granted, nor election of any archbishop or bishop by the dean and

chapter made, but that the King may, by his letters patents, at all times, when any archbishoprick or bishoprick is void, confer the same to any person whom the King shall think meet: the which collation, so by the King's letters patents made, and delivered to the person to whom the King shall confer the same archbishoprick or bishoprick, or to his sufficient proctor and attorney, shall stand to all intents, constructions and purposes, to as much and the same effect, as though *Congé d'élire* had been given, the election duly made, and the same confirmed. And thereupon the said person to whom the said archbishoprick, bishoprick, or suffraganship is so collated, or given, may be consecrated and sue his livery or *ouster le main*, and do other things as well as if the said ceremonies and elections had been done and made.

II. “Provided always, and be it enacted by the authority aforesaid, that every such person to whom any collation and gift of any archbishoprick, bishoprick, or suffraganship shall be given or collated by the King, his heirs or successors, shall pay, do, and yield, to all and every person, all such fees, interests, and duties, as of old time have been accustomed to be done; any thing in this act, or in any other, to the contrary hereof, in anywise notwithstanding.”

2 Ed. 6, and Harley in the last year of the same reign (*b*). And, Confirmation of
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therefore we have no precedents in his reign.

In the reign of Mary, the realm of England was, as we all know, reconciled to the Pope; and there is in Burnet something which shows that a sort of practice had already obtained, in reference to this statute of Hen. 8, because we have something—it is but slight—relative to the consecration of Cardinal Pole. Now Cardinal Pole, or Pool as he is called in this book, had come into England as a Cardinal a latere; but if he was elected, he was not confirmed and consecrated, during Archbishop Cranmer's life. Archbishop Cranmer was burnt upon the 21st of March, 1556; and immediately after he died,—after the Martyrdom of Archbishop Cranmer—the investiture and consecration of Cardinal Pole proceeded. Burnet states it in this way: “On the 22nd of March, the very day after Cranmer was burnt, Pool was consecrated Archbishop of Canterbury, by the Archbishop of York, the Bishops of London, Ely, Worcester, Lincoln, Rochester, and St. Asaph. He had come over only a cardinal deacon, and was last winter made a priest, and now a bishop. It seems he had his *Congé d'élire* with his election, and his bulls from Rome”—So here again are the bulls from Rome—“already dispatched before this time. The Pope did not know with what face to refuse them, being pressed by the Queen on his account, though he wanted only a colour to wreak his vengeance upon him; to which he gave vent, upon the first opportunity that offered itself. It seems Pool thought it indecent to be consecrated as long as Cranmer lived; yet his choosing the next day for it, brought him under the suspicion of having procured his death: so that the words of Elijah to Ahab concerning Naboth were applied to him; ‘*thou hast killed and taken possession*’”(c).

That is all that occurs in the reign of Mary, that I am aware of. But I presume, and I have no doubt, that, in the reign of Mary, bishops were elected, and confirmed and consecrated, in the same fashion that they had been during the remainder of the reign of Hen. 8, and (as in the instance of Cardinal Pole), that the breves, and bulls, and so on, were obtained from Rome for these confirmations and consecrations. But what is the instance, coming nearer the present time, of what was done at the confirmation and consecration of Archbishop Parker, the first Archbishop in the reign of Queen Elizabeth, and when the realm, as is well known, had again become protestant?

Queen Mary died on the 17th of November, 1558. I proceed to shew the interpretation put upon that statute (the 25 Hen. 8, c. 20), by all persons called in to construe it. Immediately upon the accession of Elizabeth, or very soon after, in the year 1558, the Queen named Parker for the Archbishoprick of Canterbury; but he desired to be excused taking upon himself that office. But on the 28th of May,

(*b*) Barlow was translated from St. David's to Bath and Wells, by letters patent, bearing date, February 3, 1548. Harley was appointed Bishop of Hereford, A. D. 1553. See Burnet's

Hist. Ref. vol. 1, part 1, p. 401, (Oxford, 1816); Godwin de Præsulibus Angliæ, pp. 387, 494.

(c) Burnet's Hist. Reform. vol. 2, part 1, p. 614, (ed. Oxf. 1816).

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1559, Elizabeth insisted upon his coming to Court; and he did come, but again declined, lamenting his being so meanly qualified, that he could not serve her in that high office. "But in the conclusion he submitted himself to her pleasure. In the end, he was with great difficulty brought to accept of it. So on the 8th day of July, the *Congé d'élire* was sent to Canterbury; and upon that, on the 22nd of July, a Chapter was summoned to meet the 1st of August; where the Dean and Prebendaries meeting, they, according to a method often used in their elections, did by a compromise refer it to the Dean to name whom he pleased: and he naming Doctor Parker, according to the Queen's Letter, they all confirmed it, and published their election, singing *Te Deum* upon it. On the 9th of September"—now we shall see how the process was conducted—"On the 9th of September the Great Seal was put to a warrant for his consecration, directed to the Bishops of Duresme, Bath and Wells, Peterborough, Landaffe, and to Barlow and Scory, (style'd only Bishops, not being then elected to any sees), requiring them to consecrate him. From this it appears that neither Tonstal, Bourn, nor Pool, were at the time turned out; it seems there was some hope of gaining them to obey the laws, and so to continue in their sees.

"This matter was delayed to the 6th of December. Whether this flowed from Parker's unwillingness to engage in so high a station, or from any other secret reason, I do not know. But then the three bishops last named"—(It would appear from this, that the confirmation was not in the court of the Vicar General, but that it was by the bishops themselves in person)—"The three bishops last named refusing to do it, a new warrant passed under the Great Seal to the Bishop of Landaffe; Barlow, Bishop elect of Chichester; Scory, Bishop elect of Hereford; Coverdale, late Bishop of Exeter; Hodgkins, Bishop Suffragan of Bedford; John, Suffragan of Thetford; and Bale, Bishop of Ossory; that they, or any of them, should consecrate him. So by virtue of this, on the 9th of December, Barlow, Scory, Coverdale, and Hodgkins, met at the Church of St. Mary-le-Bow"—(Therefore, at that time, the confirmations were, as they are now, in this Church; only, instead of the confirmation being by the Vicar General, it was by the bishops in person—this being of an archbishop)—"Barlow, Scory, Coverdale, and Hodgkins, met at the Church of St. Mary-le-Bow; where, according to the custom"—(So the custom prevailed at that time)—"according to the custom, the *Congé d'élire*, with the election, and the royal assent to it, were to be brought before them: and these being read, witnesses were to be cited to prove the election lawfully made; and all who would object to it were also cited."

Can I suppose for an instant, that these four Bishops, sitting in this Church, on the subject of confirmation, would have ordered objectors to be cited for the purpose of those objectors coming in; and am I to suppose, if those objectors did come in, they could not hear them, and they would incur the penalty of *præmunire* under that statute by permitting those objections to be entertained? I cannot for a moment, I cannot for an instant suppose it. I say the plain construction of the statute is otherwise, and I shall show precedents plainly otherwise.

“And none coming to object against the election, they confirmed it according to the usual manner” (*d*). So, there was the practice at that time. Therefore, independently of the construction of the act, upon the precedents, there can be no doubt. There is one other precedent, and one only; but that is equally conclusive; and that precedent is one which I will cite from Burn (*e*), instead of bringing Collier, as I do not want to bring larger books than there is occasion for. It is referred to under the title of “Bishops,” in which the whole form of confirmation is set forth, as applied in the course of it. First, the royal assent to the election is signified under letters patent. Then there is a citation against opposers; a certificate; and so on; “the first schedule;” “a summary petition.” This is a petition of the Proctor of the Bishop elect, praying that he may be confirmed. Upon what? Upon certain allegations and proofs—“upon his alleging and proving the regularity of the election, and the merits of the person elected; which he doth in nine articles.” And then he goes to the contents of the nine articles. “Then the summary petition is admitted, and the Court decrees to proceed thereupon, and assign him a term immediate, to prove the particular matters contained in the petition; for proof of which he exhibits the process of the election made by the Dean and Chapter, the consent of the Archbishop or Bishop, and the royal assent; and then prays a time to be presently assigned for final sentence; which is decreed accordingly.” Then there is a second schedule. But, before sentence, there is a second præconization of the opposers (if any be); and then, none appearing, they are declared contumacious, by a second schedule. But then follows this:—“But if any appear, it seemeth that they shall be admitted to make their exceptions in due form of law.” And then the writer states this precedent from Collier, which I shall proceed to state, and which, I say, is perfectly conclusive upon the question, not merely upon the construction of the act upon the face of it, but the interpretation of the act, put upon it in the instances of Cardinal Pole, and Archbishop Parker, and in this case I am about to cite. “Soon after the recess of the parliament, Bishop Laud was translated from Bath and Wells to London, and Mountague promoted to the See of Chichester”—and this, I beg to observe, this was not a proceeding of the Commonwealth time, but in the time of Charles 1, when the Church was in its palmy state.—“Soon after the recess of the parliament, Bishop Laud was translated from Bath and Wells to London, and Mountague promoted to the See of Chichester. Before he was consecrated, an unexpected rub was thrown in the way. At the confirmation of bishops, there is a public notice given, that if any persons can object either against the party elected, or the legality of the election, they are to appear and offer their exceptions at the day prefixed. This intimation being given, one *Jones*, a bookseller, attended with the mob,”—(and therefore had, as in the late case of the Bishop of

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(*d*) Burnet's Hist. Reform. vol. 2, part 1, p. 723. The whole process of Archb. Parker's Confirmation, taken from the Lambeth Register, is given

in a subsequent page of this report, post, p. 56, n. (*g*).

(*e*) 1 Burn, E. L. 207; tit. Bishops, sect. 11.

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Manchester (*f*), no particular interest in any special exception. There, the opposer was merely a surgeon living at Birmingham, and not even within the diocese of the gentleman about to be confirmed. So it was in this case: a mere bookseller, of the name of Jones, attended with the mob—"appearing at the confirmation, excepted against Mountague, as a person unqualified for the Episcopal dignity. And to be somewhat particular, he charged him with popery, arminianism, and other heterodoxies, for which his books had been censured in the former parliament (*g*). But Dr. Rives who then officiated for Brent, the Vicar General, disappointed this challenge. For Jones had made some material omissions in the *manner*, and not offered his objections in form of law."—That was the case of the gentleman who objected to the confirmation of the Bishop of Manchester: his objections were not presented by a proctor of the court.—"Jones had made some material omissions in the *manner*, and not offered his objections in form of law. Particularly, the exceptions were neither given in writing, nor signed by an advocate, nor presented by any proctor of the court. Upon the failure of these circumstances, the confirmation went on."—But if the circumstances had not failed, the confirmation would not have gone on.—"Upon the failure of these circumstances, the confirmation went on." Burn adds, "The parliament, not at first apprized in point of form, were dissatisfied with the conduct of the Vicar General and inquired into the behaviour of Dr. Rives upon that occasion.—Upon which it hath been observed, That Dr. Rives, a most eminent civilian and canonist, admitted that the opposition was good and valid, had it been legally offered; and that the parliament of that time proceeded upon the same opinion."

Well then, Dr. Rives, a most eminent civilian and canonist, did not consider he should incur the penalty of *præmunire*, by suffering that objection to be taken, if taken in due manner and form. That parliament did not so consider it (*h*). It never has been so con-

(*f*) Allusion is here made to the confirmation of the Bishop elect of Manchester, (Mr. Lee), at St. James's Church, three days before, on Jan. 8, 1848; when, upon the citation against opposers being pronounced, Mr. Guttridge, a surgeon of Birmingham, came forward to oppose the confirmation. The case is reported at length, in Mr. A. J. Stephens's *Treatise on the Laws relating to the Clergy*, vol. 2, Addenda, p. 1452, n. (1).

(*g*) See Collier's Church History, part 2, book 8, p. 729; and book 9, pp. 733, 736, (fol. ed. 1714); 2 State Trials, 1258, (8vo. 1809).

(*h*) In the Journal of the House of Commons, the only entries relating to Mountague's confirmation are the following.

Luna, 9 Feb. 4 Car. Reg. "Dr. Steward and Mr. Talbott called in, of counsell for Mr. Jones: who argued

the questions about Bishop Mountague's Confirmation."

Martis, 10 Feb. 4 Car. "Saturday next [14 Feb. 1629] appointed for the lawyers of this House to speak to the points before argued, concerning Bishop Mountague's Confirmation."

Journ. H. C. vol. 1, p. 928.

There is no entry relating to this matter under the date of Feb. 14.

Amongst the MSS. of Scrjt. Maynard, in Lincoln's Inn Library, in a fasciculus headed, "A true and perfect relation of the proceedings in parliament since the beginning, 20 January, 1628," the following passage occurs, under the date of Monday, Feb. 9.

"Jones the printer concerning Mountague.

"He and his counsel were called in to argue the business against Mr. Mountague his Episcopal Confirmation.

sidered; and I humbly submit to your worships, without troubling you farther, (because I think it becomes me to say what I have to say as shortly as I can) that whether taken upon the face of the statute itself, or whether taken upon the almost contemporary opinion of the statute, or whether taken upon the term of *præmunire* itself, it is obvious, by admitting this exception, supposing it shall turn out to be (what I do not say it is to be taken) in due manner and form, that your worships will not incur the penalties of *præmunire*. And it must be an entire mistake to allege, that there is any just interpretation of the act, which can leave it to be supposed that if this exception be taken in due manner and form—I do not say one word on the character of the exception—but I say, by so interpreting it, you will not incur the penalty of *præmunire*, and that you are called upon by reason, and authority, and precedent, if this exception be taken in due form, to permit it.

Dr. *Harding*. I am with Dr. Addams, and will say a few words, endeavouring to avoid, as much as possible, repeating what has been already urged by him.

The objection, as I understand it, that strikes your worships, is this; that by permitting any one to appear and oppose this election, your worships, as well as others, are incurring the penalty of *præmunire*, under the 25 Hen. 8.

Dr. LUSHINGTON. We never said one word upon the subject: we allowed you to show your right to appear.

Dr. *Harding*. The answer I would give is this; that, independent of the statute, we appear to save our contumacy. All persons are called upon to appear, under pain of being pronounced contumacious. I appear for three clergymen, who are about to be pronounced by your worships contumacious; and we appear for them, to save their contumacy. That, I think, would be a short answer

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“*Quære*.

“1. Whether the exception be legal?

“2. Whether the confirmation be good?

“The last is the point now in hand touching the house, they enjoined the counsel to speak.

“The counsel proposed a third question.

“3. What will be the fruit or effect if in law, the confirmation prove void?

“In this the counsel said, it will not extend to make him no Bishop upon the point of confirmation only,* which maketh him punishable if he execute anything concerning the Bishoprick.

“SIR HENRY MARTIN,

“The exception making void the confirmation, doth in law work also upon election, and will make that void also.

“DOCTOR STEWARD,

“He saith that the point of setting

to the advocate's hand is but matter of form in Court, no matter of law.

“SIR HENRY MARTIN,

“He saith he will endeavour to give the house full satisfaction, and he will speak without relation to the King's right and laws of the realm. The proclamation at the common law should not be at Bow Church, but at the Cathedral Church of the diocese where the Bishop is to be elected. And the Dean and Chapter, and clergy of the diocese are to except, and not every one that will.

“The arguments are endless. And I conceive it to be plain that the King and the law have power to deprive him of his Bishoprick if he deserve the same. I think therefore it were good to decline this dispute, and to seek to remove him, which was allowed of.”

Maynard's MSS. M. LIX. fasc. 22, fol. 25.

* There is some error here. See 2 Cobbett's Parl. Hist. 461.—R. J.

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on that ground, if it rested there only. And there may be this additional reason given; that as it has fallen from your worships that you consider yourselves sitting in this consecrated place as a court, and you have called on all persons to appear in your court, *primâ facie* any person offering to appear according to the forms of that court,—exhibiting a proxy, by a proctor, in an ecclesiastical court, before the Primate and Metropolitan of England, whose immediate representatives you are, in an ecclesiastical proceeding, according to ecclesiastical practice and law—has a right to be heard: that when all persons are cited to appear, on any party appearing agreeably to such forms, your worships have no power, without violating every principle of ecclesiastical law, and every principle of justice, as recognized in every court in this country, to deny a person so appearing his right to appear.

This must, if it stood alone there, be an answer to what fell from one of your worships, deeply versed in ecclesiastical law. It may be that we are fighting with a shadow, in attempting to grapple with the statute of Henry 8, because your worships have not intimated that you consider yourselves bound by that statute. Then, if it is not that statute, permit me to ask, by what do your worships feel yourselves called upon to do such an act, as it is stated you may be called upon by law to do, most reluctantly I am sure? To go through, in this consecrated place, such a mockery of justice as this, as to call upon persons to appear, and then to question or deny the right of a person who appears according to the most solemn form of ecclesiastical law, in an ecclesiastical court, wherein your worships have admitted you consider yourselves to be this morning sitting?

I conceive it would be indecorous and unnecessary to occupy any further time upon this point; having the honour, as I have, of addressing three of the most experienced persons in the kingdom, habituated to the daily practice of ecclesiastical law, and the daily administration of justice in ecclesiastical courts, and sitting here as an ecclesiastical court. I may, however, presume to speculate upon the statute we have gone into, the statute of Henry 8; and I shall address myself to it, endeavouring to avoid repeating any portion of the ground so ably gone over by the learned counsel who has preceded me, who has called your attention to the time, the circumstances, and the persons to be considered, at the time the statute was passed, and the interpretation it has received ever since it was passed. He has shown conclusively that it was never suggested, until this morning, that this statute offered any impediment to your entertaining any opposition to the confirmation of a bishop elect in England. He has shown that such opposition has actually been entertained,—once only, I admit—and has only been defeated for want of form, notwithstanding the statute was then as operative as it is now, and notwithstanding the opposition was argued before an eminent civilian of the time, as well aware of the statute as any of your worships. I shall not therefore repeat that ground at all, but merely call your attention to the legal view of this statute; for I conceive that, if your worships are to construe this statute, you must do so by the same rules as any other statute in the statute book.

I will first call to your attention that well known principle of

English Law, that a penal statute is to be construed most strictly. And if there be any which may be called a highly penal statute, I think it is this statute. But in illustration of that, I must just point out to your worships' attention the manner in which a statute, standing now on the statute-book unrepealed, in *pari materia*, has characterized this and similar statutes. By the statute 1 & 2 Ph. & M. c. 8, this statute of Hen. 8, was afterwards repealed; but before it was repealed, there is a statute of Queen Mary, which I am about to read a part of, and which statute is now standing unrepealed in the statute-book. And I contend that nothing can be a more apt illustration of the view that you, as lawyers, are called upon to take of the statute, than to see the manner in which the Legislature, by another statute in operation, has characterized that which your worships are to construe this morning.

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The act of the 1 Mary, c. 1, commences in this way—"Forasmuch as the state of every king, ruler, and governor of any realm, dominion, or commonalty, standeth and consisteth more assured by the love and favour of the subject towards their sovereign ruler and governor, than the dread and fear of laws made with rigorous pains and extreme punishment for not obeying of their sovereign ruler and governor; and laws also justly made for the preservation of the commonweal, without extreme punishment or great penalty, are more often for the most part obeyed and kept, than laws and statutes made for extreme punishments, and in special such laws and statutes so made, whereby not only the ignorant and rude unlearned people, but also learned and expert people minding honesty, are often and many times trapped and snared, yea many times for words only, without other fact or deed, done and perpetrated:"—it then goes on in a subsequent clause (*i*) to enact in these words:—"And be it further ordained and enacted by the authority aforesaid, that all offences made felony, or limited or appointed to be within the case of *præmunire*, by any act or acts of parliament, statute or statutes, made sithence the first day of the first year of the reign of the late King of famous memory, King Henry the Eighth, not being felony before, nor within the case of *præmunire*, and also all and every branch, article, and clause, mentioned or in anywise declared in any of the same estatutes concerning the making of any offence or offences to be felony, or within the case of *præmunire*, not being felony nor within the case of *præmunire* before, and all pains and forfeitures concerning the same, or any of them, shall from henceforth be repealed, and utterly void and of none effect."

Now I am not about to contend before your worships, that although this statute (upon which I am assuming your objection, or your scruple rather, is founded), is repealed by a statute of Mary, (which latter statute is still in force), that, therefore, under all the circumstances, it is to be taken generally as repealed; because I know that might be answered by the allegation, that it has since been confirmed. But I say, it is a perfectly legitimate and sound argument to read the passages I have cited, and to call your attention to the reasons for which that statute is repealed by the 1st of Mary, for

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the purpose of seeing how the Legislature has, at another period, characterized such a penal statute as this.

The next principle to which I must call your worships' attention, is one which will be found in Lord Coke. And that is, that a statute ought always to be expounded according to the intent of the maker. It is laid down in *Coke's Fourth Institute*, p. 330:—"Every statute ought to be expounded according to the intent of them that made it, where the words thereof are doubtful and uncertain, and according to the rehearsal of the statute; and there [*scil.* 4 E. 4, fo. 4 & 12] a general statute is construed particularly upon consideration had of the cause of making the act, and of the rehearsal of all the parts of the act."

The next principle to which I shall direct your attention is one equally clear, that the words of a statute are to be taken in their lawful and rightful sense. That is to be found in *Coke's First Institute*, 381, b. "Secondly, the words of an act of Parliament must be taken in a lawful and rightful sense; as here the words being ('whereof no fine is levied in the King's Court,') are to be understood, whereof no fine is lawfully or rightfully levied in the King's Court."

That last principle brings me immediately to the consideration of the statute on which I am attempting to address your worships; because, in that statute if there are any penalties imposed, it is only upon those who shall not elect pursuant to the statute; or shall oppose the confirmation of any person *so elected*. You will see it is all one way; the statute speaks of "a person *so elected*." It is enacted in the 4th section "by virtue of which licence, the said dean and chapter, or prior and convent, to whom any such licence and letters missive shall be directed, shall with all speed and celerity *in due form* elect." And it afterwards goes on to say, in the 5th section, "requiring and commanding such archbishop, to whom any such signification shall be made, to confirm the said election, and to invest and consecrate the said person *so elected*," that is "*in due form* elected."

Before it is suggested that there could be any reason for imagining that the penalty of *præmunire* should attach to any person for doing that which the opposers are attempting to do, or which we are calling on your worships to do, the statutes are to be taken according to the regular effect and meaning of the words "*in due form* elected." And the opposition which is forbidden by the statute (if at all), is to the confirmation of a person who *is* elected, i. e. *in due form* elected. Now if it should turn out that the person is not *so* elected, or is not *in due form* elected, that alone would be an answer to the statute of Hen. 8: and how is it possible that your worships can tell what is to be the nature of the objection, if you refuse, if you suppose yourselves called upon absolutely to refuse to hear the party objecting?

Suppose it should turn out, (and it may well be so until you hear the objection), that Dr. Hampden has not been elected at all by the Dean and Chapter of Hereford; that he has not been *in due form* elected. Suppose there has been only the shadow or pretence of an election. Again, suppose it should turn out that he has been elected by certain persons having no right or title to elect. Suppose that, the right of election being vested by law in the Dean and Chapter of Hereford, the master and fellows of some college in the

city, or the sheriff and his *posse comitatús*, had broken into the Cathedral and elected the Bishop; that surely would not be such an election as the statute contemplates; and opposing such an election could not be opposing the statute. Then by refusing to hear the objectors, you are precluding all possibility of discussion on that point. Then, as to the ability of the person:—(I am not going to oppose the ability of the person; that would be premature at present); but *supposing*, again, that the person so elected,—it may well happen, it is not any violent presumption—supposing, I say, the person so elected should be a person under a legal disability; supposing he were a Turk, jew, infidel, or heretic; supposing he be one of the Queen's enemies, or convicted of treason or felony; is it possible to contend, that, by suggesting and proving such an objection, we should be incurring the penalty of the statute, in requesting your worships to deal with it? Would not that be carrying out in effect the policy of the statute? But that you cannot speculate upon, and it is impossible you can know what the objection is to be, if you begin by refusing to hear the objector.

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There is one other case, to which it is necessary I should call the attention of your worships; and that was decided in the Court of King's Bench, after mature consideration, and at a time when this statute of Hen. 8, and the whole of the circumstances that led to it, were much more fresh in recollection, than they are now; and that was the case of *Evans and Kiffins v. Askwith*, in *Jones's Reports*, p. 158. It was often argued, and discussed by all the judges of the King's Bench on two separate days, as appears by the Report. It is also in *Latch (j)*, which I have not by me; and I am citing from *Jones's Report*, which is much fuller. There the Judges had directly under their consideration the statutes of Hen. 8, and particularly the statute of the 25th of Hen. 8, c. 21, which they mention; and therefore I presume that they were aware of the 25th of Hen. 8, c. 20; and they laid down there, after hearing the case often argued, and after being two days in consideration about it—for that is the way I read the report: "*cest case fuit soven-foits argue al barre, et apres per les justices al 2 several jours*;" there the arguments lasted two days, or being concluded, the Judges took two days to consider before they gave their solemn judgment—

The VICAR GENERAL. What was the question in that case?

Dr. Harding. The validity of a lease. It would occupy too much of your time, if I were to go through the whole of it; but I will read the material part of it. "*Il fuit ausi agree que le manner a faire evesq; auxibien sur translation, comme de novo*"—And the Judges then proceed to set out all the different steps; and it is very remarkable, when they come to that part of it relating to the confirmation, they say: "*Et donque le Roy per ses letters patens done son royal assent, et command l'Archevesque de luy confirme, et consecrate, et a faire tout choses necessary, sur que l'Archevesq; examin le election, et ability del person, et sur ceo il confirme le election, et apres luy consecrate.*" It does not seem to have suggested itself to any Judge in the King's Bench, that the Archbishop, by examining into

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the validity of the election, and ability of the person elected, was incurring any of the penalties of this statute; for when they are laying down, in this solemn manner, the practice of making a bishop, it is a little singular that they should set out the practice of that time to be, (that is, in the 3rd of Charles I, when old persons were still living who could remember the Reformation in its latter stages), that the archbishop was to examine the election, and ability of the person. I merely add that case to the precedents which my learned friend has endeavoured to furnish you with.

Now, Sir, the last point is merely this, that you are here sitting in a Court; you are citing persons to appear and object; you are allowing the Proctor for the Bishop elect to plead, to give evidence, and he is asking for a solemn sentence in writing; you are pronouncing all persons contumacious who do not appear; and at the very same time, it is suggested, you may conceive it to be your duty to prevent any party so appearing being heard, except upon the question as to his general right to appear. I beg your worships for one moment to consider the monstrous consequences. Look, on the face of it, at the absurdity, at the mockery of the thing you are called upon to do. And what is the very strong and overwhelming reason that is to compel your worships to go through this mockery, or rather, convert what has always been imagined to be a solemn proceeding in a Court, into little more than a mockery of public justice? I say it with the most perfect respect to the Court before whom I appear: you will only do it, because you conceive yourselves under some overwhelming necessity imposed upon you, as you apprehend, by the Statute Law; for it is in direct violation of the common law, in complete derogation of common right and common reason, and in direct violation of the practice of the Ecclesiastical Courts. Upon the face of it, to call upon opposers and pronounce them contumacious, and prevent their being heard, would be so, unless this extraordinary course of conduct is to be forced upon your worships by the statute of Hen. 8. I should be trespassing too much upon your worships' time, if I were to go over the same ground as Dr. Addams has done; but I would beseech your worships, only to look at the general purview of the act, that it is intituled "An Act for the Non-payment of First-fruits to the Bishop of Rome" (*k*). And then the statute recites that act not commonly printed, and "forasmuch as in the said act (*l*), it is not plainly and certainly expressed in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated, within this realm, and in all other the King's dominions, be it now therefore enacted."—Nothing can be more clear, than that the intention of the makers was directed against Roman usurpation; and nothing was further from their intention, than to compel a Court sitting here to go through the mockery of justice which it is suggested you are compelled, sitting here, to go through this morning.

(*k*) Such is the title of the act, in Ruffhead's edition of the Statutes. In Raithby's edition, the title is, "An Act restraining the Payment of Annates;" which is likewise the title of

the act, in the *Statutes of the Realm*, published by the Commissioners of Public Records.

(*l*) 23 Hen. 8, c. 20, *supra*, p. 31, n. (*s*).

As the last observation I shall trouble your worships with, I beg you above all to look at the words of the 7th section, that is, always supposing you may feel any difficulty upon the statute. The well known principle of construing every statute,—namely, that general words preceded by particular words, are to be taken to apply to things *ejusdem generis*—I need not urge before your worships. An act^(m) “for preventing the stealing and destroying of sheep and other cattle,” (which, it was said, could not apply to stealing horses) would be a general illustration of that. What are the particular acts enumerated in the 7th section, against which the penalties of *præmunire* are directed? They are all of a Romish character. Who is the person here, that incurs the penalty of a *præmunire*? Why,—“if any of them, or any other person or persons, admit, maintain, allow, obey, do, or execute any *censures*,” Romish censures,—(that is not what we are proposing to ask your worships to do), “*excommunications*”—(Roman again), “*interdictions*”—(Roman again), “*inhibitions*”—(there is no question of an inhibition), “*or any other process or act*”—(I beg your worships’ attention to this. Is this a “process or act” *ejusdem generis*?) “*or any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of due execution of this act.*” Any act contrary to that statute, must be something totally different to what we are doing, because it never could be contended that the law allowed you, or compelled you, to call upon opposers with one breath, and object to their being heard with the other. I submit, lastly, that the words here are not at all sufficient to include persons who appear pursuant to your citation. That is not doing any act contemplated by, or within the purview of these express words of the statute of Hen. 8. Above all, I beseech your worships to consider the extraordinary and violent consequences which are said to ensue (for some reason or other we are not able to speculate upon) by those who say you are required to do,—what it is suggested you may feel yourselves compelled to do—an act in derogation of the common law of England, and also in derogation of the ecclesiastical law and practice, and in derogation of common right and of common reason. We say, such a duty can only be imposed upon your worships by the statute, which statute, we contend, has no application to the premises; and it was never within the contemplation of the Legislature to apply it to anything of this kind. The words are not apt, and do not cover what we are endeavouring to do here. We trust, therefore, that we shall be heard in an Ecclesiastical Court, into which we are cited.

(Dr. Robert Phillimore rose, to address the Court).

The VICAR GENERAL. We cannot hear another gentleman.

Dr. Robert Phillimore. If I may be permitted to read one sentence only, upon a case already cited, in *Fuller’s Church History*, having read that one passage, I will sit down, without making any further observations. I am reading from vol. 3, page 354 (n), and it sets out by stating that Mountague was to be made a bishop. It goes on in these words, “There is a solemnity performed before the consecration of every bishop, in this manner. The royal assent being passed on his election, the Archbishop’s Vicar General pro-

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ment.

(m) 14 Geo. 2, c. 6. See 1 Black. Com. 88.

(n) Book II., cent. 17, ¶ 68, *et seq.*

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ceeds to his confirmation, commonly kept in Bow Church. A process is issued forth to call all persons to appear, to show cause why the elect there present should not be confirmed. For, seeing a bishop is in a manner married to his see (save that hereafter he taketh his surname from his wife, and not she from him,) this ceremony is a kind of asking the banns, to see if any can allege any lawful cause to forbid them. Now, at the confirmation of Mr. Mountague, when liberty was given to any objectors against him, one Mr. Humphreys, (since a Parliament Colonel, lately deceased), and William Jones, a stationer of London, (who alone is mentioned in the record), excepted against Mr. Mountague, as unfitting for the episcopal office, chiefly on this account, because lately censured by parliament for his book, and rendered incapable of all preferment in the Church."

This is the passage I more particularly request your worships' attention to, for it concerns the practice of your own Court :

"But exception was taken at Jones's exceptions (which the record calls *prætenso articulos*), as defective in some legal formalities. I have been informed, it was alleged against him, for bringing in his objections *vivâ voce*, and not by a proctor, that Court adjudging all private persons effectually dumb, who speak not by one admitted to plead therein. Jones returned, that he could not get any proctor, though pressing them importunately, and proffering them their fee, to present his exceptions, and therefore was necessitated *ore tenus* there to allege them against Mr. Mountague. The register (o) mentioneth no particular defects in his exceptions, but Dr. Rives (substitute at that time for the Vicar General) declined to take any notice of them, and concludeth Jones amongst the contumacious, "*quod nullo modo legitime comparuit, nec aliquid in hac parte, juxta juris exigentiam diceret, exciperet, vel opponeret.*"

I will not trespass one moment further upon your worships' attention. I am indebted to you, for permitting me to read this single passage, which seems to confirm the view, that if Jones had appeared legitimately, and had properly excepted, the Court would have been bound, by common law, and the ecclesiastical law, to give him a hearing.

Dr. Bayford, for the Dean and Chapter, was stopped by the Court.

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the Vicar
General.

The VICAR GENERAL. Notwithstanding the very able arguments which we have heard, I am of opinion that we are bound to proceed to the confirmation of the election of Doctor Hampden to the Bishoprick of Hereford, under the provisions of the statute of the 25 Hen. 8, which clearly extends to the present case, and by which, if we should commit or suffer any let or hindrance to such confirmation, we should become liable to the penalties of *præmunire*. I may observe, with reference to one point taken, that the act itself prescribes no mode of proceeding in the performance of the duty enjoined, nor refers to any. The office, whence these proceedings originate, supplies none beyond the form now in use, and this has been acted upon for upwards of three hundred years. The citation and præconization may seem to imply the existence of others, in the call made by them upon opposers to appear and make their objections, if they have any; but how those objections are to be received,

in what form to be made, how to be proved and sustained, and with what result, is no where, that I can find, laid down, with reference to the ceremony of the confirmation of bishops in England, by any writer on the subject, or any text writer on the law, or in any book of authority, recognized in this country. Whether, in the codes of other countries, any such forms of procedure are to be found, grounded upon the authority of the canon law, or the decrees of councils, I am unable to say. In the present case, we are bound by the statute law of the realm, which leaves us no alternative but that of confirming this election, certified, as it has been, by the Dean and Chapter of Hereford, or of subjecting ourselves to the pains and penalties of *præmunire*.

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Dr. LUSHINGTON (*o*). The question which is now to be decided is, in the first instance, whether the parties who have attempted to appear are entitled to appear and to be heard before the Commissioners of his Grace the Archbishop of Canterbury. Now, if they were entitled to appear before this Court, it would almost of necessity follow that they would be entitled to be heard, and that their objections must be discussed and disposed of by the authority of the same tribunal. But that this Court could have power to examine into any case regarding the life, conduct, or proceedings of a person chosen to be a Bishop of this realm, since the passing of the Clergy Discipline Act (*p*). I entertain great and serious doubts. I apprehend that it would be impossible for us under any circumstances to enter into the consideration of any one fact or circumstance forming a charge or offence comprised within that Statute. But it is not necessary to follow up this consideration; for it is our duty to look, in the first instance, to the Statute passed expressly for the regulation of our conduct upon the present occasion. The Statute which has been so often referred to, and read in great part by Dr. Addams, is a Statute truly described to have been passed at the commencement of the Reformation: a Statute memorable, no doubt, for all its provisions, and not the less so because it restored to the Crown of Great Britain its undoubted right, and put to sleep for ever the pretensions of the Bishop of Rome: a Statute to be held, therefore, in reverence, and to be carried into execution to the full extent of its spirit and its letter. Now, what are the words of that Statute? The words of the Statute admit, as I think, of no doubt whatever. After having recited that, in the Act 23 Hen. 8, "it was not plainly and certainly expressed in what manner and fashion Archbishops and Bishops should be elected, presented, invested, and consecrated," it goes on to enact, in express terms, first, that "the said Act, and every thing therein contained," that is, relating to the payment of Annates, "shall be and stand in strength, virtue, and effect," except only, that no person shall be presented to the see of Rome; and after having confirmed the former Act, therefore, in every respect but one, it prescribes minutely, in the 4th, 5th, and 6th sections, the form of proceeding. Now the form of proceeding is this: the Crown issues a *Congé d'élire*

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(*o*) This judgment is taken from the authenticated report in 5 "*Notes of Cases in the Ecclesiastical and Maritime Courts*," xxix, which agrees

substantially with the short-hand writer's note of the same judgment.

(*p*) 8 & 4 Vict. c. 86. See sect. 23.

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to those who have the right to elect Bishops, and, at the same time, a Letter Missive, containing the name of the person to be elected. We need not enter into a discussion of the question, what would be the state of the case supposing there had been no election at all, because there is presented to us the record of an election under the corporate seal of the Dean and Chapter of Hereford, and beyond that corporate seal we cannot go. The Statute then requires and commands the Archbishop, to whom a signification shall be made, "to confirm the said election, and to invest and consecrate the person so elected to the office and dignity he is elected unto." If this were the only passage in the Statute, it is directory to the Archbishop, whose Commissioners we are, to proceed to the confirmation of the person so chosen. I think that this is not a place nor an occasion in which it would be becoming in us to enter into a long and minute examination of the arguments, or of the cases which have been cited. Nor is it in the slightest degree necessary that we should hold that the penalty of *præmunire* would attach, if we should allow parties to appear and be heard as opposers. It may be so: perhaps the better opinion is, that it would attach; but if we are ordered to proceed to confirmation, and there is nothing in this Statute which gives us a discretion in exercising the power so confided to us, then, I apprehend, it becomes our bounden duty to proceed accordingly. I will advert briefly—it shall be very briefly—to what are called precedents. It appears that, from the passing of this Statute of 25 Hen. 8 up to the present time, there have been two instances—and two instances only—which are said to savour of precedents. With respect to the case of Archbishop Parker (*q*), I am unable to collect from the statement of Dr.

(*q*) This case was subsequently referred to, more than once, by counsel, during the arguments in the Queen's Bench; and its important bearing upon the case of Dr. Hampden, has induced the Editor to insert here at length the whole record, from the Lambeth Register, so far as it relates to Archbishop Parker's *Confirmation*. The Editor has compared the present extract with the original in Lambeth Library; the contractions, however, of which have not been adopted.

"REGISTRUM REVERENDISSIMI IN CHRISTO PATRIS ET DOMINI, DOMINI MATTHEI PARKER, IN ARCHIEPISCOPUM CANTUARIENSEM PER DECANUM ET CAPITULUM ECCLESIE CATHEDRALIS ET METROPOLITICÆ CHRISTI CANTUARIENSIS PRÆDICTÆ, VIGORE ET AUCTORITATE LICENTIÆ REGIÆ EIS IN HAC PARTE FACTÆ, PRIMO DIE MENSIS AUGUSTI ANNO DOMINI MILLESIMO QUINGENTESIMO QUINQUAGESIMO NONO, ELECTI, AC PER REVERENDOS PATRES DOMINOS WILLIELMUM BARLOWE NUPER BARTONENSEM ET WELLENSEM EPISCOPUM, NUNC ELECTUM CICES-

TRENSEM, JOHANNEM SCORY, DUDUM CICESTRENSEM EPISCOPUM, NUNC ELECTUM HEREFORDENSEM; MILONEM COVERDALE QUONDAM EXONENSEM EPISCOPUM, ET JOHANNEM HODGESKYN EPISCOPUM SUFFRAGANEUM BEDFORDENSEM, VIGORE LITERARUM COMMISSIONALIUM REGIARUM PATENTIUM EIS DIRECTARUM, NONO DIE MENSIS DECEMBRIS TUNC PROXIME SEQUENTIS, CONFIRMATI, NECNON PER IPSOS REVERENDOS PATRES, AUCTORITATE PRÆDICTA, DECIMO SEPTIMO DIE EJUSDEM MENSIS DECEMBRIS, CONSECRATI, ANTHONIO HUSE ARMIGERO TUNC REGISTRARIO PRIMARIO DICTI REVERENDISSIMI PATRIS.

* "ACTA HABITA ET FACTA IN NEGOTIO CONFIRMATIONIS electionis venerabilis et eximii viri Magistri Matthæi Parker, Sacræ Theologiæ Professoris, in Archiepiscopum Cantuariensem electi, nono die mensis Decembris Anno Domini Millesimo quingentesimo quinquagesimo nono, et regni felicissimi illustrissimæ in Christo Principis et Dominae nostræ, Dominae Elizabethæ

* Cantur.

Addams, that that throws any light upon the construction of this Statute; and I must say that it is impossible to take the construction of a Statute from a book, like the work of Bishop Burnet

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Dei gratia Angliæ Franciæ et Hiberniæ Reginæ fidei defensoris, etc. anno secundo, in ecclesia parochiali Beatae Mariæ de Arcubus London, ecclesiæ metropolitice Christi Cantuariensis jurisdictionis immediatæ, coram Reverendis in Christo Patribus, Dominis Willielmo quondam Bathonense et Wellense Episcopo, nunc electo Cices-trense, Johanne Scory quondam Cices-trense Episcopo, nunc Herefordense electo, Milone Coverdale quondam Exonense Episcopo, et Johanne Bedfordense Episcopo Suffraganeo, medi-antibus literis commissionalibus paten-tibus dictæ illustrissimæ Dominiæ nostræ Reginæ in hac parte Commis-sariis inter alios, cum hac clausula, Quatenus vos aut ad minus quatuor, vestrum, etc.: necnon cum hac ad-jectione, Supplices nihilominus, etc., legitime fulcitis, in presentia mei Francisci Clerke notarii publici in actorum scribam in hac parte propter absentiam Magistri Anthonii Huse Registrarii, etc. assumpti, prout se-quitur, videlicet.

* "DIE ET LOCO prædicto, inter horas octavam et nonam ante meridiem coram Commissariis supranominatis, comparuit personaliter Johannes In-cent notarius publicus, ac presentavit eisdem Reverendis Dominis Commis-sariis literas commissionales patentes regias, eis in hac parte directas, humi-liter supplicando, quatenus onus exe-cutionis literarum commissionalium patentium hujusmodi in se assumere, ac juxta earum continentiam proce-dendum fore in dicto Confirmationis negotio decernere dignarentur. Quibus quidem literis commissionalibus de mandato dictorum commissariorum per eundem Johannem Incent publice perlectis, iidem Commissarii ob reve-rentiam et honorem dictæ Serenissimæ Dominiæ nostræ Reginæ, acceptarunt in se onus literarum Commissionalium patentium regiarum hujusmodi, et decreverunt procedendum fore juxta vim, formam, et effectum earundem. Deinde dictus Johannes Incent exhibuit procuratorium suum pro Decano et Capitulo Ecclesiæ Metropolitice Christi Cantuariensis, et fecit se par-tem pro eisdem, ac nomine Procurato-rio eorundem Decani et Capituli præ-sentavit eisdem Commissariis vena-

bilem virum Magistrum Nicholaum Bullingham Legum Doctorem, ac e regione dictorum Commissariorum sistebat; qui exhibuit procuratorium suum pro dicto venerabili et eximio viro Magistro Matthæo Parker Cantuariensi electo, et fecit se partem pro eodem. Et tunc dictus Johannes Incent exhibuit mandatum citatorium originale una cum certificatorio in dorso super executione ejusdem, et petiit omnes et singulos citatos publice præconizari. Ac consequenter facta trina publica præconizatione omnium et singulorum oppositorum ad foras ecclesiæ parochialis de Arcubus præ-dictæ, et nullo eorum comparente, nec aliquid in hac parte opponente, obji-ciente, vel excipiente, dictus Johannes Incent accusavit eorum contumacias, et petiit eos et eorum quemlibet reputari contumaces, ac in pœna, etc. viam ulterius in hac parte opponendi contra dictam electionem, formam ejusdem, aut personam electam præ-cludi. Ad cujus petitionem dicti Domini Commissarii pronunciarunt eos contumaces, ac in pœna, etc. viam ulterius in hac parte opponendi eis et eorum cuilibet præcluserunt. Necnon ad petitionem dicti Johannis Incent ad ulteriora in hujusmodi Confirmationis negotio procedendum fore decreverunt, prout in Scheda per prefatum Dominum Willielmum Barlow electum Cices-trensem de consensu Collegarum suorum lecta, plenius continetur. Qua quidem Scheda sic lecta, præfatus Johannes Incent in præsentia præfati Magistri Nicholai Bullingham procuratoris Domini electi Cantuariensis antedicti dedit Summa-riam petitionem in scriptis, quam petiit admitti. Ad cujus petitionem Domini Commissarii admiserunt dictam Summariam petitionem, et assignarunt dicto Incent ad probandum contenta in eadem ad statim. Deinde Incent, in subsidium probationis contentorum in dicta summaria petitione, exhibuit processum electionis de per-sona dicti venerabilis viri Magistri Matthæi Parker per Decanum et Capitulum Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis prædictæ factæ et celebratæ. Quo per Dominos Commissarios viso, in

* Acta confir-mationis Do-mini Matthæi Parker, Archi-episcopi Can-tuariensis.

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on the Reformation: the observations of persons not lawyers would not enable us to form a just and legal conclusion. With regard to the case of Bishop Montagu, I must express my opinion very con-

specto, et perspecto, iidem Domini Commissarii ad petitionem præfati Joannis Incent hujusmodi processum pro lecto habendum fore et censi voluerunt et decreverunt. Et tunc dictus Incent super hujusmodi summaria petitione produxit Johannem Baker generosum et Willielmum Colwyn Artium Magistrum in testes, quos Domini Commissarii ad ejus petitionem jurejurando onerarunt, de dicendo veritatem quam noverint in hac parte. Quibus per me præfatum Franciscum Clarke seorsum et secrete examinatis, eorumque dictis et attestationibus ad petitionem dicti Joannis Incent per Dominos Commissarios publicatis, et per ipsos visis et inspectis, ipsi Domini Commissarii ad petitionem dicti Incent assignarunt sibi ad proponenda omnia ad statim. Deinde Incent exhibuit omnia et singula per eum in dicto negotio exhibita et proposita quatenus sibi conducunt, et non aliter neque alio modo. Et tunc Domini ad petitionem Incent assignarunt sibi ad concludendum ad statim, dicto Incent concludente cum eisdem Dominis Commissariis secum etiam concludentibus. Qua conclusione sic facta dicti Domini Commissarii ad petitionem Incent assignarunt ad audiendum finale decretum sive sententiam diffinitivam, ad statim. Consequenter vero facta alia trina præconizatione oppositorum sic (ut præmittitur) citatorum, et non comparentium, nec quicquid vi hac parte opponentium, Domini Commissarii ad petitionem Incent pronunciarunt eos et eorum quemlibet contumaces, ac in poena contumaciarum suarum hujusmodi decreverunt procedendum fore ad prolationem sententiæ diffinitivæ sive decreti finalis in hac causa ferendi ipsorum sic citatorum et non comparentium absentia sive contumacia in aliquo non obstante, prout in schedula per memoratum Dominum Willielmum Cicestrensem electum de consensu collegarum suorum lecta dilucidius continetur. His itaque in ordine gestis, ac præstito per Magistrum Nicholaum Bullingham nomine procuratorio præfati Domini electi Cantuariensis ac in animam ipsius Domini electi juramento corporali, juxta formam descriptam in Statuto Parlia-

menti anno primo regni dictæ Dominae Reginae Elizabethæ edito, præfati Domini Commissarii ad petitionem dicti Incent tulerunt et promulgarunt sententiam diffinitivam in scriptis per præfatum Dominum Willielmum electum Cicestrensem de consensu collegarum suorum lectis, pronunciando, decernendo, cæteraque faciendo prout in eadem continetur. Super quibus tam præfatus Magister Nicholaus Bullingham quam dictus Johannes Incent me eundem Franciscum Clerke sibi unum vel plura publicum seu publica instrumentum sive instrumenta conficere, ac testes inferius nominatos testimonium inde perhibere petiverunt. Postremo autem dicti Domini Commissarii ad petitionem tam procuratoris præfati Domini electi et confirmati quam procuratoris Decani et Capituli Ecclesiæ Metropolitanæ Christi Cantuariensis prædictæ decreverunt ipsum Reverendissimum Dominum electum et confirmatum consecrandum et benedicendum fore; curamque regimen et administrationem Spiritualem et temporalium dicti Archiepiscopatus Cantuariensis eidem Domino electo et confirmato commiserunt; ipsumque in realem, actualem, et corporalem possessionem dicti Archiepiscopatus, jurumque, dignitatum, honorum, præminentium et pertinentum suorum universorum inducendum et inthronizandum fore etiam decreverunt, per Decanum et Capitulum Ecclesiæ cathedralis et metropolitice Christi Cantuariensis prædictæ, aut alium quemcunque ad quem de jure et consuetudine id munus dinoscitur pertinere, juxta Ecclesiæ Christi Cantuariensis morem laudabilem, legibus et statutis modernis hujus inclyti regni Angliæ non reclamantem aut adversantem.

* Literæ patentes de assensu regio electioni adhibita.

* "ELIZABETH Dei gratia Anglice Franciæ et Hiberniæ Regina, fidei defensor, etc. Reverendis in Christo Patribus Anthonio Landavensi Episcopo, Willielmo Barlo quondam Bathonensi Episcopo nunc Cicestrensi electo, Joanni Scory quondam Cicestrensi Episcopo nunc electo Herefordensi, Miloni Coverdale quondam Exoniensi Episcopo, Johanni Bedfordensi, Joanni Thetfordensi Episcopis Suffra-

fidently that that was a case in the worst possible times. At what period did it occur? At a period when the Parliament were usurping the rights of the Crown, and the Crown trenching upon the

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ganeis, Johanni Bale Osserensi Episcopo, Salutem. Cum vacante nuper Sede Archiepiscopali Cantuariensi per mortem naturalem Domini Reginaldi Pole Cardinalis ultimi et immediati Archiepiscopi et Pastoris ejusdem, ad humilem petitionem Decani et Capituli Ecclesiæ nostræ cathedralis et metropolitice Christi Cantuariensis eisdem per literas nostras patentes licentiam concesserimus, alium sibi eligendum in Archiepiscopum et Pastorem sedis prædictæ, ac iidem Decanus et Capitulum vigore obtentæ licentiæ nostræ prædictæ dilectum nobis in Christo Magistrum Matthæum Parker Sacræ Theologiæ Professorem sibi et ecclesiæ prædictæ elegerunt in Archiepiscopum et Pastorem, prout per literas suas patentes sigillo eorum communi sigillatas nobis inde directas plenius liquet et apparet; Nos electionem illam acceptantes, eidem electioni regium nostrum assensum adhibuimus pariter et favorem; et hoc vobis tenore præsentium significamus; rogantes ac in fide et dilectione quibus nobis tenemini firmiter præcipiendo mandantes, quatenus vos aut ad minus quatuor vestrum eundem Matthæum Parker in Archiepiscopum et pastorem Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis prædictæ (sicut præfertur) electum, electionemque prædictam confirmare, et eundem Magistrum Matthæum Parker in Archiepiscopum et Pastorem ecclesiæ prædictæ consecrare, cæteraque omnia et singula peragere quæ vestro in hac parte incumbunt officio pastoralis, juxta formam Statutorum in ea parte editorum et provisorum velitis cum effectu. Supplentes nihilominus suprema auctoritate nostra regia ex mero motu et certa scientia nostris, si quid aut in his quæ juxta mandatum nostrum prædictum per vos fient, aut in vobis aut vestrum aliquo, conditione, statu, facultate vestris, ad præmissa perficienda desit aut deerit, eorum quæ per statuta hujus regni nostri, aut per leges ecclesiasticas in hac parte requiruntur, aut necessaria sunt, temporis ratione et rerum necessitate id postulante. In cuius rei testimonium has literas nostras fieri fecimus patentes. Teste me ipsa apud Westmonasterium, sexto die Decembris, anno regni nostri secundo.

“HA. CORDELL.

“We whose names be here subscribed, think in our judgments, that by this Commission in this form penned, as well the Queen's Majesty may lawfully authorize the persons within named to the effect specified, as the said persons may exercise the act of confirming and consecrating in the same to them committed.

“William Maye.

Robert Weston.

Edward Leedes.

Henry Harvey.

Thomas Yale.

Nicholas Bullingham.

“PATEAT universis per præsentem, Quod nos, Decanus et Capitulum Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis in domo nostra capitulari capitulariter congregati, de unanimi assensu et consensu nostris dilectos nobis in Christo Magistrum Willielmum Darrell clericum in Artibus Magistrum, Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis prædictæ Canonicum et Præbendarium, Anthonium Huse Armigerum, Johannem Clarke et Johannem Incent Notarios publicos conjunctim et divisim nostros veros, certos, legitimos, ac indubitatos procuratores, actores, factores, negotiorumque nostrorum gestores, et nuncios speciales ad infra scripta, nominamus, ordinamus, facimus, et constituimus per præsentem; damusque et concedimus eisdem procuratoribus nostris conjunctim et eorum cuilibet (ut præfertur) per se divisim et insolidum potestatem generalem, et mandatum speciale pro nobis et nominibus nostris; venerabilem et eximium virum Magistrum Matthæum Parker Sacræ Theologiæ Professorem, in Archiepiscopum et Pastorem dictæ Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis per nos electum, seu ejus procuratorem legitimum, temporibus et locis congruis et opportunis adeundi; ipsumque ex parte nostra, ad consentiendum electioni de persona sua factæ et celebratæ debita cum instantia petendi et requirendi; necnon electionem hujusmodi per nos de persona præfati Magistri Matthæi Parker (ut præfertur) factam et celebratam excellentissimæ in Christo Principi et Dominiæ nostræ, Dominiæ Elizabethæ, Dei gratia Angliæ, Franciæ, et Hiberniæ Reginæ, fidei defensori, etc. dictæ ec-

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privileges of the Parliament. It appears quite evident that this precedent occurred—if precedent it be termed—in times when no reliance could be placed upon the decision of any Court whatsoever.

eclesie fundatrici et patronae, intimidandi et notificandi, ac ejus consensum et assensum regios in ea parte humiliter implorandi; ac decretum electionis praedictae, et personam per nos (ut praemittitur) electam, coram quibuscunque personis regia auctoritate in hac parte legitime fuleitis praesentandi et exhibendi; dictumque decretum sive processum electionis praedictae, et personam sic (ut praemittitur) electam, in debita juris forma confirmari et approbari, defectusque (si qui forsitan in hac parte intervenerint) debite suppleri petendi requirendi et impetrandi, agendique et defendendi, ac litem seu lites contestandi et contestari videndi, articulum sive articulos, libellum, sive libellos, seu quascunque summarias petitiones dandi et proponendi, testes, literas, et instrumenta ac alia quaecunque probationum genera producendi et exhibendi, testesque hujusmodi jurari videndi et audiendi; in causa seu causis concludendi et concludi videndi; dictumque confirmationis negotium usque ad finalem expeditionem ejusdem inclusive prosequendi; necnon administrationem omnium et singulorum spiritualium et temporalium dicti Archiepiscopatus Cantuariensis eidem electo committi, ipsumque in realem, actualem, et corporalem possessionem ejusdem Archiepiscopatus, juriumque, dignitatum, honorum, praeminentium et pertinentium suorum universorum inducendum et inthronizandum fore decerni, petendi, requirendi, et obtinendi; et generaliter omnia et singula alia faciendi, exercendi, et expediendi, quae in praemissis et circa ea necessaria fuerint seu quomodolibet opportuna, etiamsi mandatum de se magis exigant speciale quam superius est expressum. Promittimusque nos ratum, gratum, et firmum perpetuo habituros totum et quicquid dicti procuratores nostri, seu eorum aliquis fecerint seu fecerit in praemissis vel aliquo premissorum, et in ea parte cautionem exponimus per praesentes. In cujus rei testimonium, sigillum nostrum, (quo in praesenti vacatione sedis Archiepiscopalis Cantuariensis praedictae utimur) praesentibus apponi fecimus. Datum in domo nostra capitulari tertio die Mensis Augusti, Anno Domini Millesimo quingentesimo quinquagesimo nono.

*“PATEAT universis per praesentes, Quod ego, Matthaeus Parker, Sacrae Theologiae Professor, in Archiepiscopum Ecclesiae Cathedralis et Metropoliticae Christi Cantuariensis per venerabiles et eximios viros Decanum et Capitulum ecclesiae praedictae rite et legitime electus, dilectos mihi in Christo Magistros Willielmum May, Decanum Ecclesiae Cathedralis Divi Pauli London, et Nicholaum Bullingham Legum Doctorem, conjunctim et divisim meos veros, certos, legitimos ac indubitatos procuratores, actores, factores, negotiorumque meorum gestores, et nuncios speciales ad infrascripta nomino, ordino, facio, et constituo per praesentes. Doque et concedo eisdem procuratoribus meis conjunctim et eorum utrique (ut praefatur) per se divisim et insolidum potestatem generalem et mandatum speciale pro me, ac vice, loco, et nomine meis, coram Reverendis in Christo Patribus et Dominis, Dominis Willielmo quondam Bathonensi et Wellensi Episcopo, nunc Cicestrensi electo, Johanne Scory quondam Cicestrensi Episcopo, nunc electo Herefordensi, Milone Coverdale quondam Exoniensi Episcopo, et Johanne Bedfordensi Episcopo Suffraganeo, Serenissimae in Christo Principis et Dominae nostrae, Dominae Elizabethae Dei gratia Angliae Franciae et Hiberniae Reginae, fidei defensoris, etc. ad infrascripta Commissariis, cum hac clausula, videlicet, Una cum Dominis Johanne Thetfordensi Suffraganeo, et Johanne Bale Osserensi Episcopo; et etiam hac clausula, Quatenus vos, aut ad minus quatuor vestrum, etc. necnon et hac adjectione, Supplices nihilominus, etc. specialiter et legitime deputatis, comparandi, meque a personali comparitione excusandi, ac causam et causas absentiae meae hujusmodi allegandi et proponendi, ac (si opus fuerit) fidem desuper faciendi et jurandi, electionemque de me et persona mea ad dictum Archiepiscopatum Cantuariensem per praefatos Decanum et Capitulum Ecclesiae Cathedralis et Metropoliticae Christi Cantuariensis factam et celebratam per eosdem Commissarios regios approbari et confirmari, meque in Archiepraesulem Cantuariensem praedictum recipi et admitti, atque in realem, actualem, et corporalem pos-

For what right had the House of Commons to interfere with regard to the question, whether Dr. Rives had or had not done his duty upon that occasion? Is it not perfectly evident that Dr. Rives,

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sessionem dicti Archiepiscopatus Cantuariensis, juriumque et pertinentium suorum universorum induci, et inthronizari petendi, requirendi, et impe-trandi, decretaque quæcunque in hac parte necessaria et opportuna ferri et interponi petendi et obtinendi; juramentum insuper tam de fidelitate, subjectione, et obedientia dictæ Serenissimæ Dominae nostræ Reginae Elizabethæ, heredibusque et successoribus suis præstandum et exhibendum, necnon de renunciando, recusando, et refutando omnem et omnimodam auctoritatem, potestatem, jurisdictionem, et superioritatem forinsecas et extraneas, secundum vim, formam, et effectum statutorum hujus inclyti regni Angliæ in hac parte editorum et provisorum, quam etiam aliud quodcunque sacramentum licitum et honestum, ac de jure, legibus, et statutis hujus regni Angliæ in hac parte quomodolibet requisitum in animam meam et pro me præstandum subeundi et jurandi; et generaliter omnia et singula alia faciendi, exercendi, exequendi, et expediendi quæ in præmissis aut circa ea necessaria fuerint seu quodammodolibet opportuna, etiamsi mandatum de se exigant magis speciale quam superius est expressum; promittoque me ratum, gratum, et firmum perpetuo habiturum, totum et quicquid dicti procuratores mei seu eorum aliquis fecerint seu fecerit in præmissis, vel aliquo eorumdem, sub hypotheca et obligatione omnium et singulorum bonorum meorum tam præsentium quam futurorum; et in ea parte cautionem expono per præsentem. In cujus rei testimonium sigillum venerabilium virorum Dominorum Decani et Capituli Ecclesiæ Metropolitice Christi Cantuariensis præsentibus affigi procuravi. Et nos Decanus et Capitulum antedicti ad rogatum dicti Constituentis sigillum nostrum hujusmodi præsentibus apposui. Datum septimo die mensis Decembris Anno Domini Millesimo quingentesimo quinquagesimo nono, regni que felicissimi dictæ Serenissimæ Dominae nostræ Reginae Elizabethæ anno secundo.

electus Herefordensis, Milo Coverdale quondam Exoniensis Episcopus, et Johannes Bedfordensis Episcopus, Mediantibus literis Commissionibus patentibus illustrissimæ in Christo Principis et Dominae nostræ Dominae Elizabethæ, Dei gratia Angliæ, Franciæ, et Hiberniæ Reginae, fidei defensoris, etc. una cum hac clausula, videlicet, Una cum Dominis Johanne Thetfordensi Suffraganeo, et Johanne Bale Osserensi Episcopo; et etiam hac clausula, Quatenus vos, aut ad minus quatuor vestrum, etc.; necnon et hac adjectione, Supplentes nihilominus etc. nobis directis legitime fulciti; Universis et singulis dictæ Dominae nostræ Reginae subditis per Universum Angliæ regnum ubilibet constitutis, salutem. Cum vacante nuper sede Archiepiscopali Cantuariensi per mortem naturalem Domini Reginaldi Pole Cardinalis, ultimi et immediati Archiepiscopi ejusdem, Decanus et Capitulum Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis prædictæ pro electione novi et futuri Archiepiscopi et Pastoris ejusdem ecclesiæ (licentia regia primitus in ea parte petita et obtenta) celebranda certum terminum præfixerint, et assignaverint, atque in hujusmodi electionis negotio, termino ad id statuto et assignato rite procedentes, venerabilem virum, Magistrum Matthæum Parker, Sacræ Theologiæ Professore, in eorum et dictæ Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis Archiepiscopum eligierint; cumque dicta Serenissima Domina nostra Regina ad humilem petitionem dictorum Decani et Capituli eidem electioni de persona præfati electi (ut præmittitur) factæ et celebratæ, et personæ electæ, regium suum adhibuerit assensum, pariter et favore, prout per easdem literas suas patentes, magno sigillo suo Angliæ sigillatas nobis significaverit, mandando, quatenus personam electam, et electionem hujusmodi confirmare, et eundem Matthæum in Archiepiscopum Cantuariensem consecrare, juxta formam statuti in ea parte editi et provisi, velimus, cum omni celeritate accomoda, prout per easdem literas patentes regias, (ad quas habeatur relatio) plenius liquet et apparet; Nos vero volentes ejusdem

* "WILLIELMUS quondam Bathoniensis et Wellensis Episcopus, nunc Cicestrensis electus, Johannes Scory quondam Cicestrensis Episcopus, nunc

* Citatio contra oppositores, &c.

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acting as he did upon that occasion, might—I will not say that he was—but might have been, actuated by a fear of encountering the wrath of the House of Commons of those days, and so resorted to

Serenissimæ Dominae nostræ Reginae mandatis pro officii nostri debito parere, ac in hujusmodi Confirmationis negotio juxta juris et statutorum hujus inclyti regni Angliæ exigentiam procedere, omnes et singulos (si qui essent) qui contra dictam electionem, seu formam ejusdem, personamve electam, dicere, vel opponere voluerint, ad diem, locum, et effectum subscriptos, evocandos et citandos fore decrevimus, justitia id poscente. Vobis igitur conjunctim et divisim committimus et firmiter injungendum mandamus, quatenus citetis seu citari faciatis peremptorie, publice altaque et intelligibili voce infra Ecclesiam parochialem Beatæ Mariæ de Arcubus London, Ecclesiæ Christi Cantuariensis jurisdictionis immediatæ; necnon per affixionem presentium in aliquo loco convenienti infra Ecclesiam parochialem prædictam, vel in aliis locis publicis ubi videbitur expediens, omnes et singulos oppositores, (si qui sint) in specie, alioquin in genere, qui contra dictam electionem, formam ejusdem, personamve in hac parte electam dicere, obijcere, excipere, vel opponere voluerint, quod compareant coram nobis in eadem Ecclesia de Arcubus, die Sabbati proximo futuro, videlicet, nono die præsentis mensis Decembris inter horas octavam et nonam ante meridiem ejusdem diei, cum continuatione et prorogatione dierum extunc sequentium, et locorum, si oporteat, contra electionem hujusmodi, formam ejusdem, et personam in ea parte electam (si sua putaverint interesse) dicturi, excepturi, et proposituri, facturique ulterius et recepturi quod justitia in hac parte suadebit, et dicti negotii qualitas et natura de se exigunt et requirunt. Intimantes insuper, modo et forma prærecitatis, omnibus et singulis oppositoribus (si qui sint) in specie, alioquin in genere, quibus nos etiam harum serie sic intimamus, Quod sive ipsi sic citati dictis die, hora, et loco coram nobis comparuerint, et contra dictam electionem, formam ejusdem, personamve in hac parte electam, obijcere, excipere, vel opponere curaverint sive non, nos nihilominus in dicto negotio (juxta juris et statutorum in ea parte editorum exigentiam) procedemus, et procedere intendimus, ipsorum sic ci-

tatorum et non comparentium absentia sive contumacia in aliquo non obstante. Et quid in præmissis feceritis nos dictis die, hora, et loco debite certificetis, seu sic certificet ille vestrum qui præsens nostrum mandatum fuerit executus prout decet. In cujus rei testimonium sigillum venerabilium virorum Dominorum Decani et Capituli Ecclesiæ Cathedralis et Metropolitanæ Christi Cantuariensis quo in præsentē Vacatione utuntur, præsentibus affigi rogavimus. Datum Londini sexto die mensis Decembris Anno Domini Millesimo Quingentesimo quinquagesimo nono.

“NONO DIE Mensis Decembris Anno Domini Millesimo quingentesimo quinquagesimo nono in ecclesia parochiali Beatæ Mariæ de Arcubus London, Ecclesiæ Christi Cantuariensis jurisdictionis immediatæ, coram Commissariis regis retronominatis, comparuit personaliter Thomas Willett notarius publicus Mandatarius in hac parte legitime deputatus, et certificavit se septimo die Mensis Decembris jam currentis executum fuisse præsens Mandatum in ecclesia parochiali de Arcubus prædicta juxta formam inferius descriptam. Super quibus fecit fidem.

*“IN DEI NOMINE AMEN. Nos Willielmus quondam Bathonensis et Wellensis Episcopus, nunc electus Cicestrensis, Johannes Scory quondam Cicestrensis Episcopus, nunc Herefordensis electus, Milo Coverdale quondam Exoniensis Episcopus, et Johannes Bedfordensis Episcopus, Serenissimæ in Christo Principis et Dominae Nostræ, Dominae Elizabethæ, Dei gratia Angliæ, Franciæ, et Hiberniæ Reginae, fidei defensoris, etc., mediantibus literis suis regiis Commissionibus patentibus ad infrascripta Commissarii, cum hac clausula, videlicet, Una cum Dominis Johanne Thetfordensi Suffraganeo, et Johanne Bale Osserensi Episcopo; et etiam hac clausula, Quatenus vos aut ad minus quatuor vestrum, etc.; necnon et hac adjec-tione, Supplentes nihilominus etc.; specialiter et legitime deputati, in negotio confirmationis electionis de persona venerabilis et eximii viri Magistri Matthæi Parker, Sacræ Theo-

* Prima Scheda lecta contra oppositores.

the technical evasion, that the Articles had not been signed properly? But am I to come to the conclusion that, because he rejected them for want of form, therefore he would have received them

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logiæ Professoris, in Archiepiscopum Cantuariensem electi factæ et celebratæ rite et legitime procedentes, omnes et singulos Oppositores, qui contra dictam electionem, formam ejusdem, aut personam electam dicere, excipere, vel opponere voluerint, ad comparandum coram nobis istis die, hora, et loco, (si sua putaverint interesse) contra dictam electionem, formam ejusdem, aut personam electam in debita juris forma dicturos, excepturos, et præposituros legitime et peremptorie citatos, sæpius publice præconizatos, diuque et sufficienter expectatos, et nullo modo comparentes, ad petitionem procuratoris Decani et Capituli Cantuariensis, pronunciamus contumaces, ac ipsis et eorum cuilibet in penam contumaciarum suarum hujusmodi viam ulterius opponendi contra dictam electionem, formam ejusdem, aut personam sic electam hujusmodi præcludimus in his scriptis, ac etiam decernimus ad ulteriora in dicto confirmationis negotio procedendum fore juxta juris et statutorum hujus regni Angliæ exigentiam; ipsorum contumacia in aliquo non obstante.

* "IN DEI NOMINE, AMEN.

Coram vobis Reverendis in Christo Patribus et Dominis, Dominis Willielmo nuper Bathonensi et Wellensi Episcopo nunc Electo Cicestrensi, Johanne Scory quondam Cicestrensi Episcopo, nunc electo Herefordensi, Milone Coverdale quondam Exoniensi Episcopo, et Johanne Bedfordensi Episcopo, Serenissimæ in Christo Principis et Dominiæ nostræ, Dominiæ Elizabethæ, Dei gratia Angliæ Franciæ, et Hiberniæ Reginæ, fidei defensoris, etc., mediantibus literis suis regiis commissionalibus patentibus ad infrascripta commissariis, cum hac clausula, videlicet, Una cum Dominis Johanne Thetfordensi Suffraganeo, et Johanne Bale Osserensi Episcopo; et etiam hac clausula, Quatenus vos, aut ad minus quatuor vestrum etc. necnon et hac adjunctione, Supplices nihilominus, etc.; specialiter et legitime deputatis, pars venerabilium virorum Decani et Capituli Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis dicit, allegat, et in his scriptis ad omnem

juris effectum exinde sequi valentem, per viam summariæ petitionis in jure proponit, articulatum prout sequitur.

"IMPRIMIS, videlicet; Quod Sedes Archiepiscopalis Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis prædictæ, per obitum bonæ memoriæ Domini Reginaldi Cardinalis Poli nuncupati ultimi Archiepiscopi Cantuariensis nuper vacare cepit, et aliquandiu vacavit, Pastorisque solatio caruit, hocque fuit et est verum, publicum, notorium, manifestum, pariter et famosum, et ponit, conjunctim, divisim, ac de quolibet.

"ITEM; Quod dicta sede Archiepiscopali Cantuariensi (ut præmittitur) dudum vacante, ac corpore dicti Domini Reginaldi Pole ecclesiasticæ tradito sepulturæ, Decanus et Capitulum Ecclesiæ Cathedralis et Metropolitice antedictæ capitulariter congregati, et capitulum facientes, (licentia regia primitus ad id petita et obtenta) certum diem, ac domum suam capitularem Cantuariensem ad electionem futuri Archiepiscopi Cantuariensis celebrandam unanimiter et concorditer præfixerunt, ac omnes et singulos ejusdem Ecclesiæ Canonicos et Præbendarios jus, voces, aut interesse in eadem electione habentes vel habere prætendentes, ad diem et locum prædictum in hujusmodi electionis negotio processuros et procedi visuros legitime et peremptorie citari fecerunt, hocque fuit, et est verum, publicum, etc., et ponit, ut supra.

"ITEM; Quod prefati Decanus et Capitulum die et loco præfixis, videlicet, primo die Mensis Augusti ultimo præteriti, capitulariter congregati, et plenum Capitulum facientes, servatis primitus per eos de jure et dictæ ecclesiæ consuetudine servandis, unanimiter et concorditer, nullo eorum contradicente, ad electionem futuri Archiepiscopi Ecclesiæ memoratæ per viam seu formam compromissi procedendum fore decreverunt, illamque viam seu formam unanimiter assumpserunt, et elegerunt; necnon in venerabilium virum Magistrum Nicholaum Wotton, utriusque Juris Doctorem, dictæ Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis Decani, sub certis in processu ejusdem electionis expressatis legibus et condi-

* Summaria
petitio.

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if they had been in form, in the teeth of this Statute, without finding it recorded in any book whatever that any such expression ever came from the mouth of Dr. Rives?—for, it is a mere innuendo,

tionibus compromiserunt, promittentes se illum acceptaturos in eorum et dictæ Ecclesiæ Archiepiscopum, quem dictus Compromissarius sub legibus et conditionibus prædictis, duxerit elegendum et providendum. Et ponit, ut supra.

“ITEM; Quod dictus Compromissarius onus compromissi hujusmodi in se acceptans, matura deliberatione apud se habita, votum suum in venerabilem et eximium virum Magistrum Matthæum Parker, Sacræ Theologiæ Professorum, direxit, ipsunque in Archiepiscopum et Pastorem Ecclesiæ Cathedralis et Metropolitici Christi Cantuariensis prædictæ juxta et secundum potestatem sibi in ea parte concessam et compromissionem prædictam elegit, et ecclesiæ memoratæ de eodem providebat. Et ponit, ut supra.

“ITEM; Quod omnes et singuli dictæ Ecclesiæ Canonici et Præbendarii in domo capitulari prædicta tunc presentes plenum Capitulum constituentes, electionem per eundem Magistrum Nicholaum Wotton, Compromissarium antedictum (ut præmittitur) factæ et celebratæ, approbarunt, ac ratam et gratam habuerunt pariter et acceptam. Et ponit, ut supra.

“ITEM; Quod electio hujusmodi et persona electa die prænotato in Ecclesia Metropolitana Christi Cantuariensi prædicta, coram clero et populo tunc in multitudine copiosa ibidem congregatis, debite publicatæ et declaratæ fuerunt. Et ponit, ut supra.

“ITEM; Quod dictus Reverendissimus Dominus electus, hujusmodi electioni de se et persona sua (ut præmittitur) factæ et celebratæ, ad humilem petitionem eorundem Decani et Capituli consentiit, debitum loco et tempore requisitus, ac consensum et assensum suos eidem præbuit in scriptis per eum lectis. Et ponit, ut supra.

“ITEM; Quod præfatus Magister Matthæus Parker, fuit et est vir providus et discretus, literarum sacrarum eminente scientia, vita et moribus merito commendatus, liber, et de legitimo matrimonio procreatus, atque in ætate legitima et in ordine sacerdotali constitutus, necnon Deo devotus, et Ecclesiæ memoratæ ap-

prime necessarius, ac dictæ Dominae nostræ Reginae, regnoque suo et reipublicæ fidelis et utilis. Et ponit, ut supra.

“ITEM; Quod præfati Decanus et Capitulum, hujusmodi electionem et personam electam præfatæ Serenissimæ Dominae nostræ Reginae, per literas suas patentes sigillo eorum communi et capitulari roboratas, pro officii sui debito, juxta statutum hujus regni Angliæ, significarunt, et intimarunt. Et ponit, ut supra.

“ITEM; Quod præsentato pro parte Decani et Capituli antedicti eidem Regiæ Sublimitati processu electionis hujusmodi, eadem benignissima Domina nostra Regina, pro sua clementia regia, hujusmodi electioni de persona præfati venerabilis viri Magistri Matthæi Parker (ut præmittitur) factæ et celebratæ, consensum et assensum suos regios gratiose adhibuit et adhibet, illamque gratam habet. Hocque fuit et est, etc. Et ponit, ut supra.

“ITEM; Quod dicta Serenissima Domina nostra Regina vobis Reverendis Patribus antedictis de assensu et consensu suis regis, hujusmodi electioni (ut præmittitur) adhibitis per literas suas patentes vobis inscriptas et directas non solum significavit, verum etiam earundem literarum suarum patentium serie vobis rogando mandavit, quatenus vos electionem prædictam et eundem electum confirmare, ipsumque Episcopalis insigniis insignire et decorare, cæteraque peragere quæ vestris in hac parte incumbunt officiis pastoralibus, juxta formam statuti in ea parte editi et provisi, et literarum patentium hujusmodi, velitis cum favore. Et ponit, ut supra.

“ITEM; Quod præmissa omnia et singula fuerunt et sunt vera, publica, notoria, manifesta, pariter et famosa, atque de et super eisdem laborarunt et in præsentem laborant publica vox et fama, unde facta fide de jure in hac parte requisita, ad quam faciendam offert se pars dictorum Decani et Capituli promptam et paratam pro loco et tempore congruis et opportunis, petit eadem pars præfatam electionem et personam electam confirmandam fore decerni, et cum effectu confirmari, juxta juris et statutorum hujus regni Angliæ exigentiam, necnon et literarum

which some persons have thought fit to affix upon his conduct. There are other points with regard to the form of proceeding, and the alleged inconsistency of citing persons to appear and then not

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regiarum commissionum patentium prædictarum, vobis in hac parte directarum, seriem; curamque, regimen, et administrationem Archiepiscopatus Cantuariensis eidem electo committi; ipsumque in realem, actuaalem, et corporalem possessionem dicti Archiepiscopatus Cantuariensis, juriumque, honorum, dignitatum, præminentium et pertinentium suorum universorum inducendum et inthronizandum decerni, ulteriusque fieri et statui in præmissis adea concernentibus quibuscumque quod juris fuerit et rationis, supplendo defectus quoscunque in hac parte intervenientes, juxta facultatem vobis concessam. Quæ proponit et fieri petit pars ista proponens conjunctim et divisim, non arctando se ad omnia et singula præmissa probanda, nec ad onus superflua probationis de quo protestatur, sed quatenus probaverit in præmissis, eatenus obtineat in petitis, juris beneficio et dictæ Domine nostræ Reginæ gratia speciali in omnibus semper salvis, vestrum officium, Domini Judices antedicti, humiliter implorando.

* "EXCELLENTISSIMÆ, SERENISSIMÆ, et invictissimæ in Christo Principi, et Domine nostræ, Domine Elizabethæ, Dei gratia Angliæ, Franciæ, et Hiberniæ Reginæ, fidei defensori, etc. Vestri humiles et devoti Subditi Nicholaus Wotton utriusque Juris Doctor, Decanus Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis, et ejusdem Ecclesiæ Capitulum, omnimodas obedientiam, fidem, et subjectionem, gratiam perpetuam et felicitatem in eo per quem reges regnant et principes dominantur. Ad vestræ serenissimæ Regiæ Majestatis notitiam, deducimus et deduci volumus per præsentem, quod vacante nuper sede Archiepiscopali Cantuariensi prædicta per obitum bonæ memoriæ Reverendissimi in Christo Patris et Domini, Domini Reginaldi Pole Cardinalis, ultimi et immediati Archiepiscopalis et Pastoris ejusdem, Nos Decanus et Capitulum antedicti, habita prius licentia vestra excellentissimæ Majestatis, ne eadem Ecclesia Cathedralis et Metropolitica per suam diutinam vacationem gravia pateretur incommoda, ad electionem futuri Archi-

episcopi et Pastoris ejusdem procedere volentes, vicesimo secundo die mensis Julii ultimi præteriti, in domo nostra Capitulari Ecclesiæ memoratæ capitulariter congregati, et Capitulum ibidem facientes, diem Martis, videlicet, primum diem præsentis mensis Augusti, ac horam nonam et decimam ante meridiem ejusdem diei, ac domum capitularem prædictam, cum continuatione et prorogatione dierum et horarum extunc sequentium et locorum (si oporteat) in ea parte fienda, nobismetipsis tunc ibidem præsentibus, et aliis ejusdem Ecclesiæ canonicis et præbendaris absentibus, jus, voces, aut interesse in electione futuri Archiepiscopi Ecclesiæ memoratæ habentibus seu habere prætendentibus, ad electionem futuri Archiepiscopi et Pastoris præfatæ Ecclesiæ, (divina favente clementia) celebrandam pro termino et loco competentibus præfiximus et assignavimus. Ad quos quidem diem horam et domum capitularem antedictos, omnes et singulos canonicos prædictæ Ecclesiæ, jus, voces, aut interesse in hujusmodi electione et electionis negotio habentes in specie, cæterosque omnes alios et singulos (si qui essent) qui de jure seu consuetudine in hac parte jus et interesse habere prætenderent in genere, ad procedendum et procedendum nobiscum in eodem electionis negotio, ac in omnibus et singulis actis usque ad finalem expeditionem ejusdem, juxta morem antiquum et laudabilem consuetudinem Ecclesiæ prædictæ in hac parte ab antiquo usitatos et inconcuse observatos legitime et peremptorie, citandos, et evocandos, et monendos fore decrevimus; et in ea parte literas citatorias fieri in forma efficaci, valida, et assueta, fecimus: necnon potestatem et mandatum dilecto nobis in Christo Nicholao Simpson in ea parte commisimus, cum intimatione, quod sive ipsi sic citati in hujusmodi electionis negotio die, hora, et locis prædictis comparuerint sive non, nos nihilominus in eodem negotio procederemus et procedere intendemus, ipsorum citatorum absentia sive contumacia in aliquo non obstante. Quo quidem die Martis, videlicet, primo die mensis Augusti adveniente, inter horas prius assignatas, Nos Decanus et Capitulum antedicti (campana

* Processus
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hearing them. Why, no doubt there may be an inconsistency in these modes of proceeding; indeed, I think it would be vain to deny that such is the case. But what are the facts? The times

ad capitulum celebrandum primitus pulsata) domum capitularem Ecclesie Cathedralis predictae ingressi, et capitulum ibidem celebrantes, in dilecti nobis in Christo Johannis Incent Notarii publici ac testium inferius nominatorum praesentis, licentiam vestrae Serenissimae Regiae Majestatis supradictae, necnon literas citatorias de quibus supra fit mentio, una cum certificatorio super executione earundem per Nicholaum Simpson Mandatarium nostrum antedictum, coram nobis tunc et ibidem introductas et exhibitas publice perlegi fecimus, Quarum quidem licentiae, literarum citatoriarum, et certificatorii tenores de verbo ad verbum sequuntur, et sunt tales: ELIZABETH Dei gratia Angliae, Franciae, et Hiberniae Regina, fidei defensor, etc. Dilectis Nobis in Christo Decano et Capitulo Ecclesiae Metropolitanae Cantuariensis Salutem. Ex parte vestra nobis est humiliter supplicatum, ut cum ecclesia praedicta, per mortem naturalem Reverendissimi in Christo Patris et Domini Domini Reginaldi Pole, Cardinalis, ultimi Archiepiscopi ejusdem, jam vacat, et Pastoris sit solatio destituta, alium vobis eligendum in Archiepiscopum et Pastorem licentiam nostram fundatorem vobis concedere dignaremur; Nos precibus vestris in hac parte favorabiliter inclinati, licentiam illam vobis duximus concedendam; rogantes, quod talem vobis eligatis in Archiepiscopum et Pastorem, qui Deo devotus, et regno nostro utilis et fidelis existat. In cujus rei testimonium has literas nostras fieri fecimus patentes, teste meipsa apud Westmonasterium, decimo octavo die Julii, anno regni nostri primo. NICHOLAUS WOTTON utriusque juris Doctor, Decanus Ecclesiae Cathedralis et Metropolitanae Christi Cantuariensis, et ejusdem Ecclesiae Capitulum, Dilecto nobis in Christo Nicholao Simpson, Clerico, Salutem. Cum Sedes Archiepiscopalis Cantuariensis praedicta per obitum Reverendissimi in Christo Patris et Domini, Domini Reginaldi Pole Cardinalis, ultimi Archiepiscopi ejusdem, jam vacat, et Archiepresulis sive Pastoris solatio destituta existit, Nos Decanus et Capitulum praedicti, in domo capitulari Ecclesiae an-

tedictae, die subscripto, atque ad effectum infrascriptum, (licentia regia primitus habita et obtenta) capitulariter congregati, et capitulum facientes, ne Archiepiscopatus praedicta suae vacationis diutius deploraret incommoda, nobismetipsis pro tunc praesentibus, ac omnibus aliis canonicis ejusdem Ecclesiae tunc absentibus, jus et voces in electione futuri Archiepiscopi ejusdem ecclesiae habentibus, diem Martis, videlicet, primum diem proxime sequentis mensis Augusti, ac horam nonam et decimam ante meridiem ejusdem diei, et domum capitularem praedictam, cum continuatione et prorogatione dierum et horarum extunc sequentium (si oporteat) in ea parte fienda, ad electionem futuri Archiepiscopi praefatae ecclesiae (Deo favente) celebrandam pro termino et loco competentibus praefiximus et assignavimus; necnon ad diem, horam, et locum predictos omnes et singulos ipsius Ecclesiae Cathedralis et Metropolitanae Christi Cantuariensis canonicos et praebendarios, tam praesentes quam absentes, jus et voces in hujusmodi electione et electionis negotio habentes, ad faciendam, exercendam et expediendam omnia et singula quae circa electionem hujusmodi in ea parte necessaria fuerint, seu de jure aut consuetudine ecclesiae praedictae vel hujus incliti regni Angliae statutis quomodolibet requisita, usque ad finalem ejusdem negotii expeditionem inclusive, per citationes, literas, sive schedulas in stallis praebendarum suarum, juxta morem praeteriti temporis, ac statuta et laudibiles consuetudines ecclesiae praedictae hactenus ab antiquo in ea parte usitatas et observatas, affigendas, et ibidem dimittendas, peremptorie citandos et monendos fore decrevimus, justitia mediante; Tibi igitur committimus et mandamus tenore praesentium, quatenus cites seu citari facias peremptorie omnes et singulos praefatae Ecclesiae Cathedralis et Metropolitanae Christi Cantuariensis Canonicos praebendatos in stallis eorum in choro ejusdem Ecclesiae (citationibus, literis, et schedulis in ipsis stallis publice affixis et ibidem dimissis); Quos nos etiam tenore praesentium sic citamus, quod compareant et eorum quilibet compareat coram nobis, prae-

when this Statute was passed were times when we were emerging from the power of the Papacy into the freedom of the Reformation, and when the practice, and I am sorry to say the principles, too,

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dicto primo die mensis Augusti, in domo capitulari prædicta, et inter horam nonam et decimam ante meridiem ejusdem diei, cum continuatione et prorogatione dierum et horarum extunc sequentium, (si oporteat) in ea parte fienda in præfata electionis negotio, et in singulis actis ejusdem, usque ad finalem dicti negotii expeditionem inclusive fiendam, legitime processuri, et procedi visuri, cæteraque omnia et singula alia facturi, subituri, et audituri, quæ hujusmodi electionis negotii natura et qualitas de se exigunt et requirunt. Intimando nihilominus citatis prædictis omnibus et singulis harum serie, quod sive ipsi juxta effectum citationis hujusmodi, die, hora, et loco prædictis nobiscum comparuerint sive non, nos tamen eisdem die, hora, et loco, in dictæ electionis negotio, usque ad finalem expeditionem ejusdem inclusive procedemus, prout de jure et consuetudine fuerit procedendum, eorum sic citatorum absentis sive contumaciis in aliquo non obstantibus. Et quid in præmissis feceritis, nos dictis die, hora, et loco debite certificare cures una cum præsentibus. Datum in domo nostra capitulari, vicesimo secundo die Mensis Julii Anno Domini Millesimo quingentesimo quinquagesimo nono. VENERABILIBUS et eximiis viris Magistris Nicholao Wotton, utriusque juris Doctori, Decano Ecclesiæ et Metropolitice Christi Cantuariensis, et ejusdem Ecclesiæ Capitulo, vester humilis et devotus, Nicholaus Simpson, Clericus, vester ad infrascripta Mandatarius rite et legitime deputatus, omnimodas reverentiam et obedientiam cum obsequiis exhibitione tantis viris debitas. Mandatum vestrum reverendum præsentibus annexum vigesimo secundo die Mensis Julii ultimi præteriti humiliter recepi exequendum. Cujus auctoritate et vigore, dicto vigesimo secundo die Julii, per affixionem dicti vestri Mandati in Stallo vestri præfati Domini Decani infra chorum ejusdem Ecclesiæ Cathedralis et Metropolitice, atque per affixionem citationum schedularum in singulis stallis canonicorum et præbendariorum dictæ ecclesiæ, juxta vim, formam, et effectum

Mandati vestri citatorii hujusmodi publice affixarum, et ibidem dimissarum, omnes et singulos canonicos præbendas in dicta ecclesia obtinentes, in electione futuri Archiepiscopi ejusdem Ecclesiæ, jus, voces, et interesse habentes, aut habere prætendentes, peremptorie citari feci, quod comparerent et eorum quilibet compareret coram vobis, die, hora, et loco in Mandato vestro reverendo prædicto specificatis, una cum continuatione et prorogatione dierum et horarum (si oporteat) extunc sequentium, vobiscum tunc et ibidem in hujusmodi electione et electionis negotio, juxta juris exigentiam, et dictæ ecclesiæ Cathedralis consuetudines processuri et procedi visuri, usque ad finalem expeditionem ejusdem inclusive, ulteriusque facturi in ea parte quod tenor et effectus dicti vestri Mandati de se exigunt et requirunt. Intimando insuper, et intimari feci, eisdem sic citatis, quod sive ipsi dictis die, hora, et loco vobiscum comparuerint sive non, vos nihilominus eisdem die, hora, et loco, cum continuatione et prorogatione dierum et horarum hujusmodi, extunc sequentium juxta juris exigentiam et præteriti temporis observantiam, in hujusmodi electionis negotio procedere intenditis, ipsorum citatorum contumacia absentiaque sive negligentia in aliquo non obstantibus. Et sic Mandatum vestrum prædictum in forma mihi demandata, debite exequi feci et causavi. Nomina vero et cognomina prædictorum Canonicorum (ut præmittitur) citatorum inferius describuntur. In cujus rei testimonium sigillum venerabilis viri Officialis Domini Archidiaconi Cantuariensis præsentibus apponi procuravi. Et nos officialis antedictus ad specialem rogatum dicti certificantis sigillum nostrum hujusmodi præsentibus apposuimus. Datum, quoad sigilli appensionem, primo die Mensis Augusti Anno Domini Millesimo quingentesimo quinquagesimo nono. Mr. Johannes Milles, Mr. Arthurus Sentleger, Mr. Hugo Turnebull, Mr. Richardus Fawcet, Mr. Radulphus Jackson, Mr. Robertus Collins, Mr. Johannes Knight, Mr. Willielmus Darrell, Mr. Thomas Wood, Mr. Nicholaus Harpesfeld, Mr. Johannes Butler. QUI-

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vacillated; and is there any wonder that a sovereign upon this throne, in those times, should be anxious to retain the ancient form, though at the same time anxious to engross into his own hands the real power? I shall follow this up no further than by expressing

BUS omnibus et singulis præmissis sic gestis et expeditis, omnibusque et singulis prædictæ ecclesiæ Canonicis, jus et voces in hujusmodi electione et electionis negotio habentibus seu habere prætendentibus legitime et peremptorie ad eodem diem, horam, et locum citatis ad foras dictæ domus capitularis publice præconizatis, comparentibus personaliter una nobiscum dicto Decano, Magistris Johanne Milles, Arthuro Scutleger, Willielmo Darrell, et Johanne Butler, præfatæ Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis Canonicis et Prebendariis, Nos Decanus et Capitulum antedicti sic capitulariter congregati prænominatum Johannem Incent notarium publicum in actorum scribam electionis prædictæ assumpsimus; necnon Magistrum Johannem Armerar Clericum, et Gilbertum Hilde generosum in testes ejusdem electionis negotii et agendorum in eodem personaliter tunc præsentem elegimus, et eos rogavimus nobiscum ibidem remanere. Et mox nos Nicholaus Wotton Decanus antedictus de consensu dictorum Canonicorum et Præbendariorum prædictorum tunc præsentium in hujusmodi electionis negotio procedentes, omnes et singulos alios Canonicos et Præbendarios, ad eodem diem, horam, et locum citatos, publice alta voce ut supra præconizatos, diu expectatos, et nullo modo comparentes pronuntiavimus contumaces, et in penam contumaciæ in dicto electionis negotio procedendum fore decrevimus, eorum absentia sive contumacia in aliquo non obstante—in scriptis per nos sub hujusmodi verborum tenore lectis. IN DEI NOMINE AMEN. Nos Nicholaus Wotton, utriusque juris Doctor, Decanus Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis, de unanimi assensu et consensu Capituli ejusdem Ecclesiæ, omnes et singulos Canonicos et Prebendarios Ecclesiæ memoratæ ad hos diem et locum ad procedendum in negotio electionis futuri Archiepiscopi et Pastoris Ecclesiæ Cathedralis prædictæ juxta morem præteriti temporis in eadem Ecclesiâ usitatum et observatum legitime et peremptorie citatos, publice

præconizatos diu, videlicet, in horam, locum, et tempus rite assignatos, expectatos et nullo modo comparentes, pronuntiavimus contumaces, et in penam contumaciæ suarum hujusmodi et eorum cujuslibet decernimus jus et potestatem procedendi in hujusmodi electionis negotio ad alios canonicos comparentes spectare et pertinere, et ad ulteriora in eodem electionis negotio procedendum fore ipsorum citatorum et non comparentium absentia sive contumacia in aliquo non obstante. HIS EXPEDITIS, Nos Nicholaus Wotton, Decanus antedictus de consimilibus consensu, assensu, et voluntate eorumde Canonicorum et Præbendariorum tunc præsentium, quasdam Motionem et protestationem in scriptis simul redactas et conceptas fecimus et publice legebamus tunc et ibidem sub hujusmodi sequitur verbarum tenore. IN DEI NOMINE AMEN. Nos Nicholaus Wotton utriusque Juris Doctor, Decanus Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis, vice nostra, ac vice et nomine omnium et singulorum canonicorum et confratrum nostrorum hic jam præsentium, monemus omnes et singulos suspensos, excommunicatos, et interdictos (si qui forsitan inter nos hic jam sint) qui de jure seu consuetudine aut quavis alia occasione, seu causa, in præsentis electionis negotio interesse non debent, quod de hac domo capitulari statim jam recedant, ac nos et alios de præsentis Capitulo, ad quos jus et potestas eligendi pertinet libere eligere permittant, protestando omnibus via, modo, et juris forma melioribus et efficacioribus quibus melius et efficacius possumus et debemus nomine nostro ac vice et nomine omnium et singulorum Canonicorum, Præbendariorum, et confratrum nostrorum prædictorum hic jam præsentium, quod non est nostra nec eorum voluntas tales admittere, tanquam jus, voces, et interesse in hujusmodi electione habentes, aut procedere vel eligere cum eisdem. Immo volumus et volunt quod voces talium (si quæ postmodum reperiantur, quod absit, in hujusmodi electioni intervenisse) nulli præstent auxilium, nec afferant alicui nocumentum, sed prorsus pro non receptis, et non habitis, nullisque et invalidis

my conviction, as one of the Commissioners,—without saying that any one would incur the penalty of *præmunire*,—that I conceive it my duty to refuse to allow the appearance which is now offered, and to proceed to the confirmation of Dr. Hampden.

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penitus et omnino habeantur et censcantur; Canonicos vero omnes præsententes pro pleno Capitulo Ecclesiæ prædictæ habendos et censendos fore debere pronunciamus et declaramus in his scriptis. CONSEQUENTER vero declarato publice per nos Nicholaum Wotton antedictum Decanum Capitulo (Quia propter diversas, etc.) expositisque per nos tribus modis electionis, cunctisque canonicis tunc præsentibus publice percontatis, secundum quem modum sive quam viam illarum trium in dicto capitulo (quia propter diversas, etc.) comprehensarum in hujusmodi electionis negotio procedere voluerint, Nos Decanus et Capitulum antedicti de et super forma electionis hujusmodi, ac per quam viam sive formam fuerit nobis procedendum ad electionem futuri Archiepiscopi Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis prædictæ diligenter tractavimus; et tandem nobis Decano et Canonicis antedictis (ut præfertur) tunc ibidem præsentibus, et Capitulum in ea parte facientibus visum est et placuit nobis Decano, ac omnibus et singulis supradictis, nullo nostrum discrepante seu contradicente, per viam seu formam compromissi in hujusmodi electionis negotio procedere, ac tunc et ibidem in venerabilem virum Magistrum Nicholaum Wotton, Decanum antedictum, sub certis expressatis legibus et conditionibus, ita quod dictus compromissarius priusquam è domo Capitulari prædicta recederet, et antequam capitulum hujusmodi solveretur, unum virum idoneum in Archiepiscopum et Pastorem Ecclesiæ memoratæ eligeret, compromissimus; promittentes nos bona fide illum acceptaturos in nostrum et dictæ Ecclesiæ Archiepiscopum, quem ipse Compromissarius sub modo et forma prænotatis duxerit eligendum et providendum. HISQUE in hunc modum dispositis, præfatus Magister Nicholaus Wotton, Compromissarius antedictus, onus compromissi hujusmodi in se acceptans, vota sua in venerabilem virum Magistrum Matthæum Parker, Sacræ Theologiæ Professore, juxta et secundum potestatem sibi in hac parte factam et concessam, ac compromissionem prædictam direxit, ipsumque in Archie-

piscopum et Pastorem ejusdem Ecclesiæ elegit, et Ecclesiæ prædictæ de eodem providebat, prout in schedula tenorem et formam compromissi electionis et provisionis prædictæ continente, per eundem Magistrum Nicholaum Wotton publice lecta, (cujus tenor de verbo in verbum sequitur) dilucidius continetur. IN DEI NOMINE AMEN. Cum vacante nuper sede Archiepiscopali Cantuariensi, per obitum bonæ memoriæ Reverendissimi in Christo Patris Domini Reginaldi Pole Cardinalis, ultimi Archiepiscopi et Pastoris ejusdem, vocatis et legitime præmonitis ad electionem futuri Archiepiscopalis dictæ sedis omnibus et singulis, qui de jure vel consuetudine dictæ Ecclesiæ ad electionem hujusmodi fuerint evocandi, ac omnibus qui debuerint aut potuerint hujusmodi electionis negotio commode interesse, in domo Capitulari antefatæ Ecclesiæ, termino ad dictam electionem celebrandam præfixo et assignato, præsentibus et capitulariter congregatis, placuerit Decano, omnibusque et singulis ejusdem Ecclesiæ Capituli, nemine contradicente vel discrepante, per viam seu formam compromissi, de futuro sedis prædictæ Archiepiscopo providere, ac mihi Nicholao Wotton Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis prædictæ Decano, jus et vocem in hujusmodi electionis negotio habenti, compromissario in hac parte specialiter et legitime electo plenam et liberam dederint et concesserint potestatem, auctoritatem, et mandatum speciale, die isto, antequam ab hac domo capitulari recederem ac recederent, et capitulo durante personam habilem et idoneam in Archiepiscopum et Pastorem dictæ Ecclesiæ, et eidem providendi prout ex tenore dicti compromissi manifeste liquet et apparet; Ego Nicholaus Wotton Decanus antedictus, onus compromissi hujusmodi acceptans in venerabilem virum Magistrum Matthæum Parker, Sacræ Theologiæ Professore, vota mea dirigens, virum utique providum et discretum, literarum scientia, vita, et moribus merito commendatum, liberum, et de legitimo matrimonio procreatum, atque in ætate legitima et ordini sacerdotali constitutum, in spiritualibus et temporalibus plurimum cir-

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Sir John Dodson. I have only to express my entire concurrence with the view of the case, as taken by my learned brothers.

The VICAR GENERAL. Let the registrar proceed to the business according to the usual form.

cumspectum, scientem, volentem, et valentem jura et libertates dictæ Ecclesiæ tueri, et defendere, vice mei, viceque, loco, et nomine totius Capituli ejusdem Ecclesiæ, prædictum venerabilem virum, Magistrum Matthæum Parker, præmissorum meritorum suorum intuitu, in Archiepiscopum et Pastorem ejusdem Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis, infra tempus mihi ad hoc datum et assignatum, eligo in communi, et eidem ecclesiæ provideo de eodem in his scriptis. DEINDE nos Decanus et Capitulum antedicti præfatam electionem et personam electam, utpote rite factam et celebratam obviis ulnis amplexantes, ac eam ratam, gratam, et firmam habentes, eundem Magistrum Matthæum Parker, electum in Archiepiscopum et Pastorem præfatæ Ecclesiæ, quatenus in nobis fuit aut est, acceptavimus, et electionis hujusmodi approbavimus. CONSEQUENTER vero, Nos Decanus et Capitulum antedicti, præfato Magistro Willielmo Darrell potestatem dedimus et concessimus, electionem nostram hujusmodi et personam electam clero et populo palam publicandi, declarandi, et manifestandi prout moris est, atque in similibus de usu laudabili fieri assolet. POSTREMO vero, nos Decanus et Capitulum antedicti, domum nostram capitularem antedictam egredientes, et Chorum ecclesiæ memoratæ intrantes, Hymnum, Te Deum laudamus, in Sermone Anglico per ministros Chori solemniter decantari fecimus. Quo peracto, præfatus Magister Willielmus Darrell, juxta potestatem sibi elargitam, ministris ejusdem ecclesiæ ac plebi tunc coadunatæ, electionem nostram hujusmodi et personam electam verbo tenus publicavit, et denunciavit, ac declaravit. QUÆ OMNIA et singula nos Decanus et Capitulum antedicti, pro officii nostri debito vestræ Serenissimæ Majestati sub serie in hoc processu inserta, duximus significanda; eidem majestati vestræ humiliter et obnixè supplicantes, quatenus electioni nostræ hujusmodi sic (ut præmittitur) factæ et celebratæ, consensum et assensum vestros regios adhibere, et eandem confirmari facere et mandare dignetur vestra excellen-

tissima Majestas, ut (Deo Optimo maximo, bonorum omnium largitore, favente et opitulante) dictus electus et confirmatus nobis preesse valeat, utiliter pariter et prodesse; ac nos sub eo et ejus regimine bono possumus Deo in dicta Ecclesia militare. ET UT de præmissorum veritate, vestræ Clementissimæ Majestati abunde constare possit, nos Decanus et Capitulum antedicti præsentem Electionis nostræ processum, signo, nomine, et cognomine ac subscriptione Notarii publici subscripti signari et subscribi, nostrique sigilli communis appensione, jussimus et fecimus communiri. Acta in Domo nostra capitulari prædicta, primo die mensis Augusti, anno Domini millesimo, quingentesimo quinquagesimo nono.

“ET EGO, JOHANNES INCENT, Cantuariensis Diocesis publicus suprema auctoritate regia Notarius in præsentī electionis negotio, in actorum scribam assumptus et deputatus, Quia omnibus et singulis actis ejusdem electionis, dum sic, (ut præmittitur) sub anno Domini, mense, die, hora, et loco prædictis agebantur et fiebant, una cum testibus de quibus in præsentī processu fit mentio, præsens personaliter interfui, eaque omnia et singula sic fieri vidi, servi, et audiui, atque in notas sumpsi; ideo hoc præsens publicum electionis decretum, sive processum, manu mea propria fideliter scriptum, exinde confeci, atque in hanc publicam et authenticam formam redegi, ac nominis et cognominis meorum adjunctione subscripsi, necnon signo meo solito et consueto signavi, unacum appensione sigilli communis dictorum Decani et Capituli, in fidem et testimonium omnium et singulorum præmissorum rogatus specialiter et inquisitus.

*“IN DEI NOMINE AMEN. Præsentis publici Instrumenti serie, cunctis evidenter appareat et sit notum, Quod anno Domini millesimo quingentesimo quinquagesimo nono, mensis vero Augusti die sexto in quodam inferiori cænaculo infra manerium Archiepiscopi Cantuarienses apud Lambeth Wintoniensis Diocesis notarie sito et situato in meique Notarii publici subscripti, ac testium inferioris nominatorum præ-

• Instrumentum super consensu Domini electi.

Mr. Underwood. I accuse the contumacy of all and singular persons cited, intimated, publicly called, and not appearing; and, in pain of such their contumacy, pray that they and every of them be

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Opposers ac-
cused of contu-
macy.

sentiis, venerabiles et eximii viri, Magister Williemus Darrell, Clericus, Canonicus et Prebendarius Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis, et Anthonius Huse Armiger, realiter exhibuerunt quoddam procuratorium sigillo communi et capitulari (ut apparuit) venerabilium virorum dominorum Decani et Capituli Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis prædictæ sigillatum, eisdem Magistris Willielmo et Anthonio, ac mihi Johanni Incent notario publicæ subscripto conjunctim et divisim factum, et se partem pro eisdem Decano et Capitulo fecerunt, ac nomine procuratorio eorundem præsentarunt venerabili et eximio viro Magistro Matthæo Parker, Sacræ Theologiæ Professori, tunc et ibidem personaliter præsentem, processum electionis de ipso et ejus persona in Archiepiscopum et Pastorem Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis prædictæ factæ et celebratæ, in et sub formis originalibus ejusdem; eundemque Magistrum Matthæum Parker instantem rogarunt et requisierunt, quatenus eidem electioni de ipso et ejus persona (ut præmittitur) factæ et celebratæ consentire dignaretur: dicto electo asserente, quod licet se tanto munere indignum judicaret, tamen ne ipse divinæ voluntati resistere ac Serenissimæ Dominae nostræ Reginae beneplacitæ (quæ ipsum, licet indignum, præfatis Decano et Capitulo commendare dignata est) minime obtemperare videretur, electioni hujusmodi consentiebat, ac consensum et assensum suos eidem præbuit in scriptis per eum lectis, tenorem qui sequitur de verbo in verbum in se complectentibus. IN DEI NOMINE AMEN. Ego Matthæus Parker, Sacræ Theologiæ Professor, in ordine Sacerdotali, atque in ætate legitima constitutus, ac in et de legitimo matrimonio procreatus, in Archiepiscopum et Pastorem Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis rite et legitimæ nominatus et electus, ad consentiendum hujusmodi electioni de me et persona mea in hac parte factæ et celebratæ, ex parte et per partem venerabilium virorum Decani et Capituli ejusdem Ecclesiæ cathedralis et metropolitice

instantem rogatus et requisitus, Dei Omnipotentis clementia fretus, electioni hujusmodi de me et persona mea sic (ut præmittitur) factæ et celebratæ, ad honorem Dei Omnipotentis Patris, Filii, et Spiritus Sancti, consentio, eidemque consensum et assensum meos semel atque iterum rogatus et interpellatus præbeo in his scriptis. Super quibus omnibus et singulis præmissis tam ipse electus quam prænominati Magistri Willielmus Darrell et Anthonius Huse Procuratores antedicti me eundem Notarium publicum subscriptum sibi unum vel plura publicum seu publica instrumentum sive instrumenta conficere, ac testes inferius nominatos testimonium exinde perhibere instantem, respective rogarunt et requisierunt. Acta fuerunt hæc omnia et singula præmissa, prout suprascribuntur et recitantur, sub anno Domini, mense, die, et loco prædictis, præsentibus tunc et ibidem Richardo Taverner Armigero, Johanne Baker generoso, Radulpho Jackson et Andrea Peerson, clericis, testibus ad præmissa videnda audienda et testificanda rogatis et specialiter requisitis.

“ET EGO Johannes Incent Cantuariensis Diocesis publicus sacra et suprema auctoritate regia notarius, quia præmissis omnibus et singulis, dum sic (ut præmittitur) sub anno Domini, mense, die, et loco prædictis agebantur et fiebant, una cum prænominatis testibus præsens personaliter interfui, eaque omnia et singula sic fieri vidi, scivi, et audiui, atque in notam sumpsi; ideo hoc præsens publicum Instrumentum manu mea propria fideliter scriptum exinde confeci, subscripsi, et publicavi, atque in hanc publicam et authenticam formam redegei, signoque, nomine, cognomine, et subscriptione meis solitis et consuetis signavi, in fidem et testimonium omnium et singulorum præmissorum rogatus specialiter et requisitus.

“*SUPER LIBELLO sive Summaria petitione data per partem venerabilium visorum Domino- rum Decani et Capituli Ecclesiæ Cathedralis et Metropolitice Christi Cantuariensis.*

“JOHANNES BAKER generosus, Depositiones
testium.

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precluded from the means of further opposing against the said election, the manner thereof, or the person elected in this behalf; and also that it be decreed to be proceeded to further acts in this

moram trahens in presenti cum venerabili et eximio viro Magistro Matthæo Parker electo Cantuariensi, xxxix annorum ætatis, oriundus in parochia Sancti Clementis in civitate Norwici, liberæ, ut dicit, conditionis, et testis de et super libello prædicto productus, juratus, et examinatus, dicit ut sequitur.

“AD PRIMUM, secundum, tertium, quartum, quintum, sextum, et septimum, refert se ad processum in hujusmodi causa habitum et factum.

“AD OCTAVUM; dicit in vim juramenti sui deponit quod idem Reverendissimus Pater Matthæus Parker fuit et est vir providus, ac sacrarum literarum scientia, vita et moribus commendatus, ac homo liber et ex legitimo matrimonio procreatus, atque in ætate legitima et in ordine sacerdotali constitutus, et dictæ Domine nostræ Regine fidelis subditus; reddendo causam scientiæ suæ in hac parte dicit, quod est frater naturalis dicti Domini Electi; suntque ex unis parentibus procreati et geniti.

“AD NONUM, decimum, et undecimum, refert se ad processum hujusmodi.

“AD ULTIMUM, dicit quod prædeposita per eum sunt vera, etc.

“WILLIELMUS TOLWYN Arrium Magister, ac Rector Ecclesiæ Sancti Antonini in civitate London, lxx annorum ætatis, ut dicit, liberæ conditionis, etc. Testis, etc.

“AD PRIMUM, secundum, tertium, quartum, quintum, sextum, et septimum, refert se ad processum hujusmodi.

“AT OCTAVUM; dicit et deponit contenta in hujusmodi articulo esse vera, de ejus certa scientia, quia dicit quod bene eum novit per hos xxx annos, ac per idem tempus secum admodum familiaris fuit, et in presenti est; et etiam dicit, quod novit ejus matrem.

“AD NONUM, decimum, undecimum, et duodecimum refert, etc.

“IN DEI NOMINE AMEN. Nos Willielmus quondam Bathonensis et Wellensis Episcopus, nunc electus Cicestrensis, Johannes Scorye quondam Cicestrensis Episcopus, nunc Herefordensis electus, Milo Coverdale quondam Exoniensis Episcopus, et Johannes

Bedfordensis Episcopus, Serenissimæ in Christo Principis et Domine nostræ, Domine Elizabethæ, Dei gratia Angliæ, Franciæ, et Hiberniæ Regine, fidei defensoris, etc. mediantibus literis suis regiis Commissionibus patentibus, ad infrascripta Commissarii, cum hac clausula, videlicet; Una cum Dominis Johanne Thetfordense Suffraganeo, et Johanne Bale Osserense Episcopo; et etiam hac clausula; Quatenus vos aut ad minus quatuor vestrum, etc.; necnon et hac adjunctione, Supplices nihilominus etc.; specialiter et legitime deputati in negotio confirmationis electionis de persona venerabilis et eximii viri, Magistri Matthæi Parker, Sacre Theologiæ Professoris, in Archiepiscopum Cantuariensem electi, factæ et celebratæ rite et legitime procedentes, omnes et singulos Oppositores, qui contra dictam electionem, seu formam ejusdem, aut personam electam dicere, excipere, vel opponere voluerint, ad comparendum coram nobis istis die, hora, et loco (si sua putaverint interesse) contra dictam electionem, formam ejusdem, aut personam electam, in debita juris forma dicturos, excepturos, et proposituros, legitime et peremptorie citatos, sæpius publice præconizatos, diuque et sufficienter expectatos, et nullo modo comparentes, nec contra dictam electionem, formam ejusdem, aut personam electam, aliquid dicentes, excipientes, vel opponentes, ad petitionem Procuratoris Decani et Capituli Cantuariensis, pronunciamus contumaces; et in pœnam contumaciarum suarum hujusmodi decernimus procedendum fore ad prolationem Sententiæ seu decreti finalis in hac causa ferendi, ipsorum sic citatorum et non comparentium contumacia in aliquo non obstante.

*“I MATTHEW PARKER elected Archbishop of Canterbury do utterly testify and declare in my conscience, that the Queen's Highness is the only Supreme Governor of this realm, and of all other her Highness' dominions and countries, as well in spiritual or ecclesiastical things or causes, as temporal. And that no foreign prince, person, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority

* Juramentum de agnoscendo supremam potestatem regiam.

Secunda Scheda contra Oppositores.

business of confirmation, the absence or contumacy of the persons so cited, intimated, publicly called, and not appearing, in anywise notwithstanding; and I porrect a schedule, which I pray may be read.

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ecclesiastical or spiritual within this realm. And therefore I do utterly renounce and forsake all foreign jurisdictions, powers, superiorities, and authorities. And do promise, that from henceforth I shall bear faith and true allegiance to the Queen's Highness, her heirs and lawful successors, and to my power shall assist and defend all jurisdictions, privileges, preeminences, and authorities granted or belonging to the Queen's Highness, her heirs and successors, or united and annexed to the imperial Crown of this realm. So help me God, and by the contents of this book.

* "IN DEI NOMINE AMEN. Auditis, visis, et intellectis, ac plenarie et mature discussis per nos Willielmum quondam Bathonensem et Wellensem Episcopum, nunc Cicestrensem electum, Johannem Scorye quondam Cicestrensem Episcopum, nunc electum Herefordensem, Milonem Coverdale, quondam Exoniensem Episcopum, et Johannem Bedfordensem Episcopum, Serenissimæ in Christo Principis, et Dominae nostræ, Dominae Elizabethæ, Dei gratia Angliæ, Franciæ, et Hiberniæ Reginae, fidei defensoris, etc. mediantibus literis suis regis commissionibus patentibus, ad infrascripta commissarios, cum hac clausula, videlicet; Una cum Dominis Johanne Thetfordense Suffraganeo, et Johanne Bale Osserensi Episcopo; et etiam hac clausula: Quatenus vos aut ad minus quatuor vestrum etc.; necnon et hac adjectione, Supplentes nihilominus, etc. specialiter et legitime deputatos, meritis et circumstantiis ejusdem causæ sive negotii Confirmationis electionis de persona venerabilis et eximii viri Magistri Matthæi Parker, Sacræ Theologiæ Professoris, in Archiepiscopum et Pastorem Ecclesiæ Cathedralis et Metropolitanæ Christi Cantuariensis, per obitum bonæ memoriæ Domini Reginaldi Pole, ultimi Archiepiscopi ibidem vacantis electi, factæ et celebratæ, quod coram nobis aliquandiu vertebatur, et in præsentī veritū et pendet indecissum; rimato primitus per nos toto et integro processu coram nobis in dicto negotio habito et facto, atque diligenter recensito, servatisque per nos de jure et statutis hujus regni

Angliæ servandis, ad nostri decreti finalis, sive sententiæ diffinitivæ Confirmationis in hujusmodi negotio ferendæ prolationem sic duximus procedendum, et procedimus in hunc qui sequitur modum. QUIA per acta, exhibita, producta, et probata, coram nobis in hujusmodi Confirmationis negotio, comperimus, et luculenter invenimus, electionem ipsam per Decanum et Capitulum Ecclesiæ Cathedralis et Metropolitanæ Christi Cantuariensis prædictæ de præfato venerabili et eximio viro Magistro Matthæo Parker electo hujusmodi, viro utique provido et discreto, vita et moribus merito commendato, libero, et de legitimo matrimonio procreato, atque in ætate legitima et ordine sacerdotali constituto, rite et legitime fuisse et esse factam et celebratam, nihilque eidem venerabili viro Magistro Matthæo Parker electo hujusmodi, de Ecclesiasticis institutis obviassæ seu obviare quo minus in Archiepiscopum Cantuariensem auctoritate dictæ illustrissimæ Dominae Nostræ Reginae merito debeat confirmari. IDCIRCO nos, Willielmus nuper Bathonensis et Wellensis Episcopus, nunc Cicestrensis Electus, Johannes Scory, quondam Cicestrensis Episcopus, nunc Electus Herefordensis, Milo Coverdale, quondam Exoniensis Episcopus, et Johannes Bedfordensis Episcopus, Commissarii regii antedicti, attentis præmissis et aliis virtutum meritis, super quibus præfatus electus Cantuariensis fidedigno commendatur testimonio, Christi Nomine prius invocato, ac ipsum solum Deum oculis nostris præponentes, de et cum consilio jurisperitorum, cum quibus in hac parte communicavimus, prædictam electionem de eodem venerabili viro Magistro Matthæo Parker, (ut præfertur) factam et celebratam suprema auctoritate dictæ Serenissimæ Dominae nostræ Reginae nobis in hac parte commissa confirmamus, supplentes ex suprema auctoritate regia, ex mero principis motu, ac certa scientia nobis delegata, quicquid in hac electione fuerit defectum, tum in his quæ juxta mandatum nobis creditum, a nobis factum et processum est, aut in nobis aut aliquorum nostrorum conditione, statu, facultate, ad hæc perficienda deest aut

* Sententia
Diffinitiva.

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First Sched-
ule.

The Vicar General read and then signed the first schedule, as follows :—

“We, Sherrard Beaumont Burnaby, Doctor of Laws, Vicar General and Official Principal, lawfully constituted, of the Most Reverend Father in God, William, by Divine Providence, Lord Archbishop of Canterbury, Primate of all England, and Metropolitan, and for executing the underwritten proceeding legally empowered, according to custom and law; proceeding regularly and lawfully in the business of confirming the election had and celebrated of the person of the Reverend Renn Dickson Hampden, D.D., elected Bishop and Pastor of the Cathedral Church of Hereford, do, at the prayer of the Proctor for the Dean and Chapter of the Cathedral Church of Hereford aforesaid, pronounce contumacious all and every opposers (if any such there be) that shall say against, except to, or oppose the said election, the form of the same, or the person in this behalf elected, being lawfully and peremptorily cited and intimated to appear before us this day, hour, and place, if they should think that it concerns them, in due course of law, to say against, except to, or oppose the said election, the form of the same, or the person in this part elected, being sufficiently expected, and publicly preconized, and in nowise appearing; and, in pain of their said contempt, do preclude them, and every of them, from any way of further opposing the said election, the form thereof, or the person in this manner elected in these writings; and do decree that the said business of confirmation shall be further proceeded in, according to the exigency of the laws and statutes of this kingdom, the absence or contumacy of them so cited, intimated, and not appearing in anywise notwithstanding.

“S. B. BURNABY, Vicar General.

“This schedule was read and subscribed by the Right Worshipful Sherrard Beaumont Burnaby, LL.D., Vicar General aforesaid, the day, hours, and place mentioned in the act, in the presence of me,

“F. H. DYKE,

“Notary Public, and Principal Registrar.”

Prayer for
admission of
summary
petition.

Mr. *Underwood*. In pain of the contumacy of all and singular persons cited, intimated, publicly called, and not appearing, I give this Summary Petition in writing, which I pray to be admitted; and that it be decreed to be proceeded summarily and plainly, and that a term be assigned me to prove the same immediately.

Summary
petition.

The Summary Petition, signed by Dr. Twiss, was then handed in. It was in these terms :—

“IN THE NAME OF GOD, AMEN. Before you, the Most Reverend Father in God, William, by Divine Providence,

deerit, tum etiam eorum quæ per statuta hujus regni Angliæ, aut per leges ecclesiasticas in hac parte requisita sunt, vel necessaria, prout temporis ratio et rerum presentium necessitas id postulant, per hanc nostram

Sententiam Diffinitivam, sive hoc nostrum finale decretum. Quam sive quod, ad petitionem partium ita petentium fecimus et promulgamus in his Scriptis.”

Lord Archbishop of Canterbury, Primate of all England, and Metropolitan, sufficiently and lawfully authorized and empowered by Act of Parliament of this Realm to perform what is hereinafter mentioned, the Letters Patent of Her Most Gracious Majesty, Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, so requiring, or before your Vicar General and Official Principal, lawfully constituted, or before his Surrogate, the Proctor of the Reverend the Dean and Chapter of the Cathedral Church of Hereford, doth say, allege, and in law propound, Article by Article, as follows, (to wit)

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petition.

"That the Episcopal See of Hereford became lately vacant by the translation of the Right Reverend Father in God, Doctor Thomas Musgrave, late Bishop and Pastor thereof, to the Archiepiscopal See of York, and hath for some time been vacant, and was and is at present destitute of the comfort of a pastor. And this was and is true, public, manifest, and also well known; and so the said party proponent doth allege and propound every thing in this article contained, jointly and severally.

1st.

"Secondly. That the said Episcopal See of Hereford being vacant as aforesaid, the Dean and Chapter thereof, being capitularly assembled, and making a chapter, having first prayed for and obtained the royal licence, did in their chapter-house fix a certain day for the election of a new and future Bishop, there to be made and celebrated; and all and each of the Prebendaries or Canons of the said Cathedral Church of Hereford having, or pretending to have, any right, vote, and interest in the said Cathedral Church of Hereford, were lawfully cited and warned to proceed on the day, and in the place aforesaid, in the business of the said election, and as before.

2nd.

"Thirdly. That the said Dean and Chapter, on the day and in the place prefixed, namely, on the twenty-eighth day of December, in the year of our Lord, one thousand eight hundred and forty-seven, being capitularly assembled, and making a chapter, observing the statutes of this realm, and what of right by them ought to be observed; and having first of all diligently considered of a person fit to be elected Bishop and Pastor of the said Cathedral Church of Hereford, did elect the Reverend Renn Dickson Hampden, Doctor in Divinity, to be their Bishop and Pastor, and with him they have provided the said Cathedral Church of Hereford, and as before.

3rd.

"Fourthly. That the said election, and the person so elected, were duly published and declared in the Cathedral Church of Hereford aforesaid, before the clergy and people in a great number then and there assembled, and as before.

4th.

"Fifthly. That the said Reverend the Bishop so elected as aforesaid, to the said election in this manner made and celebrated of him to be Bishop and Pastor of the Cathedral Church of Hereford aforesaid, did, at the humble petition of the Proctor of the Dean and Chapter aforesaid, and being in due time and place requested and earnestly entreated, consent, and thereto had given his assent and consent in writing, and as before.

5th.

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petition.

"Sixthly. That the said Reverend the Bishop elect was and is a prudent and discreet man, and eminent for his knowledge of the Holy Scriptures, for his life and morals deservedly commended, of a free condition, born in lawful wedlock, of a lawful age, and an ordained priest; and also devoted to God, and greatly useful and necessary to the aforesaid mentioned Church. And this was and is true, public, and notorious, and as before.

7th.

"Seventhly. That the said Dean and Chapter have, by their letters patent under their common seal, signified and intimated the said election, and person elected, to her most excellent Majesty our Queen, according to the custom of their office, and the statutes of this realm, and so as before.

8th.

"Eighthly. That the proceedings of the said election being presented to our said lady the Queen, on the part of the said Dean and Chapter, her said most excellent Majesty, out of her royal clemency, graciously hath given, and doth give her royal assent and consent thereto, and so as before.

9th.

"Ninthly. That the aforesaid most serene lady our Queen, hath not only signified to you, the said most Reverend Father, concerning her royal assent and consent to the said election, graciously given by her letters patent under the great seal of Great Britain, to you inscribed and directed, but also, by the tenor of the same, hath ordered, that you would favourably and effectually confirm the aforesaid election, and do, perform, and fulfil whatever else on this occasion is incumbent on your pastoral office, according to the form of the laws and statutes of this realm published and provided, and the contents of the said letters patent, and as before.

10th.

"Tenthly. That all and singular the premises were and are true, public, notorious, manifest, and also well known; and of and concerning the same there was and is a public voice, fame, and report; and the oaths in this part requisite being made, to perform which the party proponent now offers himself ready and prepared at any meet and convenient time and place, the said party proponent humbly prays the said election and person elected may be decreed to be confirmed, and may effectually be confirmed according to the exigency of the laws and statutes of this realm, and also the contents of the said royal letters patent; and that the care, government, and administration of the spirituals of the said Bishoprick, be committed to the said Bishop elect, and that it be decreed that he be inducted, installed, and enthroned into the real, actual, and corporal possession of the said Bishoprick, and of all the rights, dignities, honours, privileges, and appurtenances whatsoever. And further, that what of law and reason is meet be done, ordered, and decreed in the premises, and in whatever concerns them, by supplying whatever defects, if any by chance may have happened in the said business of election, which the said party proponent, declaring jointly and separately, proposeth and entreats may be done; not taking upon himself to prove all and singular the premises, or to the burthen of a superfluous proof, against which he here protests, but by imploring your said Grace's orders, you being my Lord the Judge, he may, so far as he hath made proof in the premises, obtain what is prayed for, the benefit of the law being in all things always preserved.

"TRAVERS TWISS."

The VICAR GENERAL. We do admit this your Summary Petition, so far as the same may be by law admitted, and do decree that it be proceeded summarily and plainly; and we do assign you a term to prove this your Summary Petition immediately.

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Assignment of
a term for
proofs.

Mr. *Underwood*. In pain of the contumacy of all and singular persons cited, intimated, publicly called, and not appearing, and in support of proof of the matters contained in my said Summary Petition, I exhibit a certificate, touching and concerning the election of the aforesaid Reverend Renn Dickson Hampden, Doctor of Divinity, to be bishop and pastor of the said cathedral church of Hereford, made by the said Dean and Chapter of the said church, and issued under their common seal. I likewise exhibit a public instrument of the consent of the said Doctor Renn Dickson Hampden to the said election, and her Majesty's letters patent before read. And I allege that all and singular the matters set forth in the said exhibits respectively were and are true, and so had and done as therein contained; and I pray all of them to be admitted, and that a term be assigned me to hear sentence instantly.

Proofs in
pænam.

The VICAR GENERAL. In pain of the contumacy of all and singular persons so as aforesaid cited, intimated, publicly called, and not appearing, we do admit these public instruments, and do assign to hear sentence instantly.

Assignment to
hear sentence.

Mr. *Underwood*. I pray all and singular the said opposers to be again publicly called.

The VICAR GENERAL. Let the opposers be again publicly called.

The Apparitor General advanced to the middle of the church, and proclaimed aloud in the same terms as before. (*supra*, p. 25).

Second præ-
cization.

Mr. *Underwood*. I accuse the contumacy of all and singular the persons so as aforesaid cited, intimated, publicly called, and not appearing; and I pray them to be pronounced contumacious, and, in pain of such their contumacy, that it be decreed to be proceeded to the pronouncing your definitive sentence: and I porrect a schedule, which I pray to be read.

Opposers
again accused
of contumacy.

The second schedule was read and signed by the Vicar General, and then attested by the principal registrar. It ran thus:

"We Sherrard Beaumont Burnaby, Doctor of Laws, Vicar General and Official Principal, lawfully constituted of the Most Reverend Father in God, William, by Divine Providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan, and for executing the underwritten proceeding legally empowered according to custom and law, proceeding regularly and lawfully in the business of confirming the election had and celebrated of the person of the Reverend Renn Dickson Hampden, Doctor in Divinity, elected Bishop and Pastor of the Cathedral Church of Hereford, do, at the prayer of the Proctor for the Dean and Chapter of the Cathedral Church of Hereford aforesaid, pronounce contumacious all and every opposers, if any there be, who would speak against, except to, or oppose the said election, the manner thereof, or the person so elected, being lawfully and peremptorily cited and intimated to appear before us this day, hour,

Second Sche-
dule.

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Second Schedule.

and place, if they should think it concerns them in due course of law to speak against, except to, or oppose the said election, the manner thereof, or the person so elected, and being publicly pre-conized and sufficiently expected and in no wise appearing, nor objecting against, excepting to, or opposing the said election, the manner thereof, or the person so elected. And in pain of such their contumacy, we decree to proceed to the pronouncing our definitive sentence or final decree, to be published in this business, the absence or contumacy of the so cited, intimated, and not appearing in any wise notwithstanding.

“S. B. BURNABY, Vicar General.

“This Schedule was made and subscribed by the Right Worshipful Sherrard Beaumont Burnaby, Doctor of Laws, Vicar General aforesaid, the day, hours, and place mentioned in the act, in the presence of me,

“F. H. DYKE,

“Notary Public and Principal Registrar.”

Mr. *Underwood*. The Lord Bishop elect is ready to take the oaths required in this behalf.

The VICAR GENERAL. Let the oaths be taken.

Oaths taken by
Dr. Hampden.

1. Oath of
allegiance.

Dr. Hampden kneeling, took the oaths, four in number, viz. :—
“I Renn Dickson Hampden, Doctor in Divinity, elected Bishop of Hereford, do sincerely promise and swear, that I will be faithful and bear true allegiance to her Majesty, Queen Victoria.

“So help me God.”

2. Oath of
Queen's supremacy.

“I Renn Dickson Hampden, Doctor in Divinity, elected Bishop of Hereford, do swear that I do from my heart abhor, detest, and abjure, as impious and heretical that damnable doctrine and position that princes excommunicated or deprived by the Pope or any authority of the see of Rome, may be deposed or murdered by their subjects or any other whatsoever, and I do declare that no foreign prince, person, prelate, state, or potentate hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority ecclesiastical or spiritual, within this realm.

“So help me God.”

3. Oath against
simony.

“I Renn Dickson Hampden, Doctor in Divinity, elected Bishop of Hereford, do swear that I have made no simoniacal payment, contract, or promise, either directly or indirectly, by myself or by any other, to my knowledge or with my consent, to any person or persons whatsoever for or concerning the procuring or obtaining the episcopal See of Hereford, nor will at any time hereafter perform or satisfy any such kind of payment, contract, or promise, made by any other without my knowledge or consent.

“So help me God.”

4. Oath of
canonical obedience to the
Archbishop of
Canterbury.

“I Renn Dickson Hampden, Doctor in Divinity, elected Bishop of Hereford, do confess and promise all due reverence and obedience to the Archbishop of Canterbury and his successors, and to the Metropolitan Church of Christ, Canterbury.

“So help me God through Jesus Christ.”

Mr. *Underwood*. I porrect a definitive sentence in writing, which I pray to be read and given.

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The VICAR GENERAL then read aloud and signed the Definitive Sentence as follows:—

“In the name of God, Amen. We, Sherrard Beaumont Burnaby, Doctor of Laws, Vicar General, and Official Principal, lawfully constituted, of the Most Reverend Father in God, William, by Divine Providence, Lord Archbishop of Canterbury, Primate of all England, and Metropolitan, being hereunto sufficiently and lawfully authorized, and having heard, seen, understood, and discussed the merits and circumstances of a certain business of confirmation of an election made and celebrated, of the person of the Reverend Renn Dickson Hampden, Doctor of Divinity, elected Bishop and Pastor of the Cathedral Church of Hereford, which is controverted and remains undetermined before us in judgment; and having considered the whole process had and done in the business of such confirmation, and having observed all and singular the matters and things that by law in this behalf ought to be observed; we have thought fit, and do thus think fit, to proceed to the giving our Definitive Sentence or Final Decree in this business, in manner following:—Whereas by the acts enacted, deduced, alleged, propounded, exhibited, and proved before us, relating to such confirmation, we have amply found and do find that the said election was rightly and lawfully made and celebrated by the Dean and Chapter of the said Cathedral Church of Hereford, of the said Reverend the Bishop elect, a man both prudent and discreet, deservedly laudable for his life and conversation, of a free condition, born in lawful wedlock, of due age, and an ordained priest, and that there neither was nor is anything in the ecclesiastical laws that ought to obstruct or hinder his being confirmed by our authority Bishop of the said See; therefore we, Sherrard Beaumont Burnaby, Doctor of Laws, the Judge aforesaid, having weighed and considered the premises, and with the assistance of the learned in the law, do, by the authority wherewith we are invested, confirm the aforesaid election made and celebrated of the person of the said Reverend Renn Dickson Hampden, Doctor in Divinity, to the Bishoprick of Hereford. And we do, as far as is in our power and by law we may, supply all defects whatsoever in the said election, if any there happen to be. And we do commit unto the said Bishop elected and confirmed the care, government, and administration of the spirituals of the said Bishoprick of Hereford. And we do pronounce, decree, and order, by this our Definitive Sentence or Final Decree, which we make and publish in these presents, that the said Bishop, so elected and confirmed, or his lawful proctor for him, shall be inducted into the real, actual, and corporal possession of the said bishoprick, and of all its rights, dignities, honours, privileges, and appurtenances whatsoever, and be installed and enthroned by the Archdeacon of Canterbury, or his deputy, according to the laudable and approved manner and custom of the said Cathedral Church, not being contrary to the laws and statutes of this realm.

The final sentence.

“S. B. BURNABY, Vicar General.”

“TRAVERS TWISS.

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The final sen-
tence.

“ This sentence was read and subscribed by the Right Worshipful Sherrard Beaumont Burnaby, LL.D., Vicar General and Official Principal, lawfully constituted, of the Most Reverend Father in God, William, by Divine Providence, Lord Archbishop of Canterbury, Primate of all England, and Metropolitan, on Tuesday the 11th day of January, in the year of our Lord, 1848, between the hours of nine and two of the same day, at the prayer of Richard Underwood, Notary Public, Proctor for the Dean and Chapter of the Cathedral Church of Hereford; in the presence of me Francis Hart Dyke, Notary Public, Principal Registrar of the province of Canterbury. Whereupon the said Richard Underwood, and so forth, requested me, and so forth, being then and there present the witnesses mentioned in the act, in the presence of me,

“ F. H. DYKE,

“ Notary Public and Principal Registrar.”

Mr. *Underwood*. The Lord Bishop, elected and confirmed, and myself, pray a Public Instrument and Letters Testimonial to be made out, of and concerning the premises.

The VICAR GENERAL. We do decree as prayed.

The Court then rose.

Letters Tes-
timonial.

The Letters Testimonial were as follows:—

“ Acts done and expedited in the business of confirming the election made and celebrated of the person of the Reverend Renn Dickson Hampden, Doctor in Divinity, to be Bishop and Pastor of the Cathedral Church of Hereford, on Tuesday, the eleventh day of January, in the year of our Lord, one thousand eight hundred and forty-eight, and in the eleventh year of the reign of our Sovereign Lady Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, between the hours of nine in the forenoon and two in the afternoon of the same day, in the parish Church of Saint Mary-le-Bow, London, before the Right Worshipful Sherrard Beaumont Burnaby, Doctor of Laws, Vicar General, and Official Principal, lawfully constituted of the Most Reverend Father in God, William, by Divine Providence, Lord Archbishop of Canterbury, Primate of all England and Metropolitan, and the Right Honourable Stephen Lushington, Doctor of Laws, Chancellor of the Diocese of London, and the Right Worshipful Sir John Dodson, Knight, Doctor of Laws, assisting him, in the presence of Francis Hart Dyke, Notary Public, Principal Registrar of the province of Canterbury.

“ On which day and place between the hours aforesaid, were presented to the said Right Worshipful Sherrard Beaumont Burnaby, Doctor of Laws, the Vicar General aforesaid, then and there sitting as judge, Her Majesty's Royal letters patent, which being publicly read by me, the aforesaid Principal Registrar, the said

Vicar General, in honour and respect due to our said Lady the Queen, took upon him the care of executing the said letters patent, and decreed to proceed upon them according to the force, form, and effect thereof, in the presence of me the aforesaid Francis Hart Dyke, Notary Public, the Principal Registrar of the province of Canterbury. Then appeared personally Richard Underwood, Notary Public (Chapter Clerk of the Dean and Chapter of Hereford), and exhibited his proxy in writing for the Reverend the Dean and Chapter of the Cathedral Church of Hereford aforesaid, sealed as aforesaid with their common seal, with red wafer, and made himself a party for the said Dean and Chapter, and as proctor for them, presented the Reverend Renn Dickson Hampden, Doctor in Divinity, elected Bishop and Pastor of the said Cathedral Church of Hereford, to the said Vicar General, and placed him before him the said Judge; then the said Richard Underwood exhibited the original Citatorial Mandate before issued against all opposers in this business, with a certificate indorsed of the due execution thereof, and prayed all and singular opposers to be publicly preconized, who being then and there three several times preconized, Richard Edward Austin Townsend, Notary Public, one of the Procurators General of the Arches Court of Canterbury, declared he appeared for the Reverend Richard Webster Huntley, Clerk, Master of Arts, of the University of Oxford, Vicar of Alberbury in the county of Salop and diocese of Hereford, the Reverend John Jebb, Clerk, Master of Arts, of Trinity College, Dublin, Rector of Peterstow in the county and diocese of Hereford, and the Reverend William Frederick Powell, Clerk, Master of Arts, of the University of Cambridge, perpetual Curate of Cirencester in the county of Gloucester, and declared he exhibited proxies under their hands and seals respectively, and declared he opposed the confirmation of the election of the said Doctor Renn Dickson Hampden, the Lord elected to the office or dignity of Hereford. The Judge aforesaid, having heard counsel learned in the law, thereupon decreed that the said Richard Edward Austin Townsend could not be permitted to appear and object to the said business of confirmation of the aforesaid election, and directed the proceedings to be further proceeded in; and no others then appearing, the said Richard Underwood accused the contumacies of all and singular opposers of this business, so as aforesaid preconized and not appearing or taking care to say, except to, or oppose anything in this affair, and prayed them to be reputed contumacious, and, in pain of such their contumacy, that they and every of them be precluded all ways and means of further opposing in the said cause or business; at whose prayer the Vicar General aforesaid did pronounce all and singular so cited, intimated, preconized, and in nowise appearing, nor taking care to say, except to, or oppose anything in this affair, to be contumacious, and in pain of such their contumacy did preclude all and every of them from any way of further opposing the said election, the manner thereof, or the person in this behalf elected; and further decreed to proceed in the said business of confirmation, the absence or rather contumacy of the so cited, intimated, and not appearing in any wise notwithstanding; as in and by a schedule

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porrected by the said proctor, and then read by the said Vicar General, is more fully contained. Which things being done, the said Richard Underwood, in pain of the contumacy of these cited, intimated, and not appearing, exhibited his summary petition in writing, and prayed it to be admitted, and so forth. Whereupon the said Vicar General admitted the said summary petition, so far as by law he might be decreed to proceed summarily and plainly, and so forth, and assigned the said Richard Underwood to prove his said summary petition forthwith; and then the said Richard Underwood, in aid of proving the things mentioned to be contained in his said summary petition, exhibited the Queen's above-mentioned royal letters patent of her royal assent, by which it appeared that the aforesaid Dean and Chapter of the Cathedral Church of Hereford aforesaid, had elected the said Reverend Renn Dickson Hampden, Doctor in Divinity, to be their and the said Cathedral Church's Bishop and Pastor, and that Her Majesty had given her royal assent to the said election; he likewise exhibited a certificate of the said Dean and Chapter of the said Cathedral Church of Hereford to the said Reverend Renn Dickson Hampden, Doctor in Divinity, the Bishop elect of Hereford, of and concerning his election to be their Bishop and Pastor, sealed as appeared with red wafer, under the common seal of them the said Dean and Chapter, and also a public instrument of and concerning the consent of him the said Reverend Renn Dickson Hampden, Doctor in Divinity, given to the said election, and alleged that all and every thing contained in the said exhibits respectively were and are true, and were so accounted and done as in the same respectively are contained, and prayed all and singular the things alleged to be admitted and that a term be assigned him to hear the sentence or final decree in this business; at whose prayer, and in pain of all and singular the so cited, intimated, preconized, and not appearing, the said Vicar General admitted the aforesaid public instruments, and assigned to hear sentence forthwith; and then, after making another public preconization three times of all and singular opposers of this business, so as aforesaid cited, intimated, and in no wise appearing, and so forth, the said Richard Underwood accused their contumacies, and in pain of such their contumacy porrected a schedule which he prayed might be read. Whereupon the said Vicar General aforesaid, at the prayer of the said Richard Underwood, the person accusing as above and praying and so forth, pronounced them all and singular contumacious, and in pain of such their contumacies did, at the prayer of the said Richard Underwood, decree to proceed to pronouncing the Definitive Sentence to be pronounced in this cause or business of confirmation, the absence or rather the contumacy of such so cited, intimated, and not appearing in any wise notwithstanding, as in the same schedule, read by the aforesaid Vicar General, is more fully contained. These things being so done and expedited, and the said Reverend Renn Dickson Hampden, Doctor in Divinity, the Bishop elect aforesaid, after having taken the oaths, upon the Holy Gospel by him touched and kissed, as well of fidelity and true allegiance to the Queen's Majesty, as of denying, refusing, and renouncing all and all manner of

foreign jurisdiction, power, authority, and superiority, according to the force, form, and effect of an act of parliament of this realm in that case published and declared, and of his not having committed any simony for or concerning the procuring or obtaining the said Bishoprick of Hereford, and also the oaths of true and canonical obedience to the aforesaid Most Reverend Father in God, the Lord Archbishop of Canterbury, and his successors, and to the Cathedral and Metropolitane Church of Christ, Canterbury, according to the canon in that case made and provided, the said Vicar General did, at the prayer of the said Richard Underwood, who porrected the Definitive Sentence, and prayed the same to be read and published and justice to be therein done, pronounce and publish the said written sentence or final decree in the business of confirmation, by pronouncing, decreeing, declaring, supplying, and doing all other things as in the said sentence is contained. Upon all and singular which premises, as well the said Lord Bishop elected and confirmed, as the aforesaid Richard Underwood, Proctor for the Dean and Chapter aforesaid, earnestly desired and requested me, the Notary Public aforesaid, to make out one or more public instrument or instruments of the execution of the premises, and decreed the underwritten witnesses to attest the same. And lastly, the said Vicar General did, at the prayer of the said Reverend elected and confirmed Bishop and the above-mentioned Richard Underwood, Proctor for the Dean and Chapter of Hereford aforesaid, decree that Letters Testimonial of and concerning all and singular the premises done and expedited in the manner and form above specified, should be made out and delivered, there being then and there present the worshipful Jesse Addams, John Dorney Harding, Augustus Frederic Bayford, Robert Joseph Phillimore, and Travers Twiss, Doctors of Law, respectively Advocates of the Arches Court of Canterbury, with many others then and there assembled.

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timonial.

“ Which I attest,

“ F. H. DYKE,

“ Notary Public, Principal Registrar.”

HILARY TERM, 11 VICT.

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Coram—Lord DENMAN, Chief Justice; and PATTESON, COLLIDGE, and ERLE, Justices(r).

14th Jan. 1848.

On the 14th of January, 1848, Sir *Fitzroy Kelly* (with whom were Mr. *A. J. Stephens* and Mr. *Badeley*), on the part of the three clergymen who had appeared as opposers, moved for a rule to show cause, why a mandamus should not issue, directed to his Grace the Archbishop of Canterbury, and to his Vicar General, Dr. *Burnaby*, commanding them, or one of them, at a Court to be therefor duly holden, in the cause, or business, or matter of the confirmation of the election of the Rev. R. D. Hampden, D.D., to the Bishoprick of Hereford, to permit and admit to appear, in due form of law, the three opposers to oppose the confirmation of the said Rev. R. D. Hampden, and to hear and determine upon such opposition, and upon the articles, matters, and proofs thereof.

The application was grounded upon the following AFFIDAVIT:—

Affidavit.

“In the Queen’s Bench.

“The Reverend William Frederick Powell, of the town of Cirencester, in the county of Gloucester, Clerk, Perpetual Curate of Cirencester aforesaid, and Richard Edward Austin Townsend, of No. 15, Godliman-street, Doctors’ Commons, in the city of London, Proctor and Notary, severally make oath and say: And first, this deponent Richard Edward Austin Townsend, for himself, saith, that he is one of the Proctors or Procurators General Exercent, duly appointed of the Arches Court of the Archbishop of Canterbury, and by virtue whereof this deponent is entitled to practise in other Ecclesiastical Courts. And this deponent saith that he was admitted as such Proctor, and is well acquainted with the usage and practices of the said Court, and of the other Ecclesiastical Courts. And this deponent saith that on the 28th day of December, 1847, the Reverend Renn Dickson Hampden, D.D., was howsoever elected by the Dean and Chapter of the Cathedral Church of Hereford, to the office or dignity of Bishop of the said diocese of Hereford, the same being theretofore vacant. And thereupon Her Majesty issued her royal letters patent, bearing date the 6th day of January, 1848, and directed to his Grace the Archbishop of Canterbury, of which the following is a copy: “Victoria, by the “Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; To the Most Reverend Father “in God, our right trusty and right entirely beloved Councillor, “William, by divine providence Archbishop of Canterbury, Primate “and Metropolitan of all England, and to all other Bishops herein

(r) Mr. Justice Wightman was sitting in the Bail Court.

" concerned, greeting. Whereas the Episcopal See of Hereford being lately vacant by the translation of the Right Reverend Father in God Doctor Thomas Musgrave, late Bishop thereof, to the Archbishop of York; upon the humble petition of the Dean and Chapter of our Cathedral Church of Hereford, we did, by our letters patent, grant them our leave and licence to choose to themselves another Bishop and Pastor of the said See; and the said Dean and Chapter, by virtue of our said licence and leave, have chosen, for themselves and the said church, our trusty and well beloved Renn Dickson Hampden, D.D., to be their Bishop and Pastor, as by their letters sealed with their common seal, directed to us thereupon, does more fully appear: We, accepting of such election, have given our Royal Assent thereto; and this we signify unto you by these presents, requiring and strictly commanding you, by the faith and allegiance by which you stand bound to us, to confirm the said election, and to consecrate the said Renn Dickson Hampden, so as aforesaid chosen to be Bishop of the said See, and to do, perform, and execute with diligence, favour, and effect, all the singular other things which belong to your pastoral office, according to the laws and statutes of England, in this behalf made and provided. In witness whereof, we have caused these our letters to be made patent. Witness ourself at Westminster, this 6th day of January in the eleventh year of our reign. By writ of Privy Seal—Langdale—Bentham." And this deponent William Frederick Powell for himself saith, that this deponent and the Reverend Richard Webster Huntley, of the parish of Alberbury, in the county of Salop, and diocese of Hereford aforesaid, Clerk, Vicar of Alberbury aforesaid, and the Reverend John Jebb, of the parish of Peterstow, near Ross, in the county of Hereford, and diocese of Hereford aforesaid, Clerk, Rector of Peterstow aforesaid, being minded, and of opinion, and verily believing, that good and valid objections existed to the confirmation of the said election of the said Dr. Hampden to the said See and Bishoprick of Hereford, they resolved and determined to oppose such confirmation, and accordingly instructed and gave their several proxies, in due form of law, to the deponent, Richard Edward Austin Townsend, and Mr. Frederick Robarts, his partner, jointly and severally, to appear on their behalf, and oppose the said confirmation. And this deponent, Richard Edward Austin Townsend, for himself further saith, that, in obedience to such letters patent, and according to the usual course of proceeding in such cases, the said Archbishop, by his Vicar General, the Right Worshipful Sherrard Beaumont Burnaby, Doctor of Laws, Vicar General of the Province of Canterbury, assisted by the Right Honourable Stephen Lushington, Doctor of Laws, and Judge of the Consistorial Court of London, and Sir John Dodson, Doctor of Laws, and Master of the Faculties, as assessors (s), for the purpose of proceeding with the cause, business, or matter of the said confirmation, proceeded in the said cause, business, or matter, in manner next hereinafter mentioned. And this deponent further saith, that the said See of Hereford is within the province of the said Archbishop of Canterbury, and that the

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Court of the Vicar General of the said Archbishop for the confirmation of bishops elected within that province, has, from time immemorial, been held at the church of Saint Mary-le-Bow, in the city of London, and that the said Vicar General, so assisted as aforesaid, proceeded with the said cause, business, or matter of the said confirmation, as hereinafter more particularly mentioned, and on Tuesday the 11th day of January, 1848, a citation or mandate against all and singular opposers, calling upon them to appear and make their objections at the said Court, on the day last aforesaid, having been first duly published in the said church, on or about the 8th day of January aforesaid, and a copy thereof having been affixed, and for some time left affixed, to the door of the said church, according to the law and practice of the said court. And this deponent further saith, that the said Vicar General and assessors assembled in the dining-room adjoining the Common Hall of Doctors' Commons, and that Richard Underwood, Esquire, Chapter Clerk of the Dean and Chapter of the Cathedral Church of Hereford, Notary Public, appointed Proctor of the said Dean and Chapter, together with John Burder, Esquire, Notary Public, and Francis Hart Dyke, Esquire, Notary Public, and one of the Procurators General Exercent in the said Arches Court of Canterbury, exhibited proxy under the hands and seals of the said Dean and Chapter, and presented to the said Doctor Renn Dickson Hampden a certificate of his being howsoever elected Bishop and Pastor of the said Cathedral Church of Hereford, and prayed him to give his consent to the said election; and thereupon the said Renn Dickson Hampden read the schedule of consent, and signed the same; and the said Vicar General immediately afterwards adjourned the business to the said church of Saint Mary-le-Bow. And these deponents, William Frederick Powell, and Richard Edward Austin Townsend, say, that they attended at and in the said church of Saint Mary-le-Bow, in the said city of London, on the said 11th day of this present month of January, when and where the court for the confirmation of the election of the said Dr. Hampden, as Bishop of Hereford, was held, before the said Right Worshipful Doctor Sherrard Beaumont Burnaby, the said Vicar General, assisted by the said Doctor Lushington and Sir John Dodson, as his assessors, as aforesaid; and that, after prayers had been duly read, the business of the said confirmation of the election of the said Doctor Hampden to be Bishop of the said diocese of Hereford, was commenced and proceeded in, by the presentation to the aforesaid Vicar General of the aforesaid letters patent of Her Majesty, of the 6th day of January, 1848, which said letters patent were read; whereupon Mr. Richard Underwood, the Chapter Clerk of the Dean and Chapter of the Cathedral Church of Hereford aforesaid, prayed the said Vicar General to take upon himself the duty of the said confirmation, and decree that the same be proceeded in, according to the form of the said letters patent and exigency of the law; and the said Vicar General having signified his assent thereto, the said Doctor Hampden was presented to the said Vicar General by the said Mr. Underwood, who then declared that he judicially produced the said Doctor Hampden, as Bishop elect of Hereford; and the said Mr. Underwood further stated, that, as proctor for the said Dean and

Chapter, he also exhibited an original mandate, together with the certificate, thereupon indorsed, touching the execution of the said mandate, against all and singular opposers, and prayed that such opposers might be publicly called. And these deponents further say, that the said Vicar General thereupon directed the Apparitor General of the said court, then present, to make proclamation, as is usual in such cases; whereupon the said Apparitor General made proclamation, in open court, in the said church, in the words following, that is to say: "Oyez! Oyez! Oyez! all manner of persons, who shall or will object to the confirmation of the Reverend Renn Dickson Hampden, D.D., to be Bishop and Pastor of the Cathedral Church of Hereford, let them come forward, and make their objections in due form of law, and they shall be heard." And these deponents further say, that immediately after such proclamation was made, and before any other proceedings were taken, this deponent, Richard Edward Austin Townsend, addressed the said Vicar General, and stated that he appeared as proctor for the Rev. Richard Webster Huntley, Clerk, M.A., of the University of Oxford, Vicar of Altherbury, in the county of Salop, and diocese of Hereford aforesaid, the Rev. John Jebb, Clerk, M.A., of Trinity College, Dublin, Rector of Peterstow, in the county and diocese of Hereford aforesaid, and the Rev. William Frederick Powell, Clerk, M.A., of the University of Cambridge, Perpetual Curate of Cirencester, in the county of Gloucester, (the other deponent hereto); and that this deponent, Richard Edward Austin Townsend, exhibited proxies, under the hands and seals of the said three last named parties respectively, and then declared that he opposed the confirmation of the election of the said Doctor Renn Dickson Hampden to the office or dignity of Bishop of Hereford aforesaid. And this deponent Richard Edward Austin Townsend for himself further saith, that upon this deponent addressing the said Vicar General, as last aforesaid, the said Vicar General inquired of this deponent, what were his objections, or used words to that effect. And this deponent saith that he had such objections in writing then in his possession, and that whilst this deponent was in the act of presenting such objections, which were in the form of a libel or plea, and were duly signed by advocates, as is usual in such cases, the said Vicar General said to this deponent, "We are acting under a mandate from the Crown issued pursuant to the provisions of the statute of the 25 Hen. 8, c. 20. And we conceive ourselves bound to confirm, without suffering any opposition," or words to that effect. And this deponent then said, in answer to the said inquiry of the said Vicar General, "Right worshipful, I bring in a libel," or words to that effect, this deponent understanding that he was assigned by the said Vicar General so to do; whereupon the said Doctor Lushington, one of the assessors of the said Vicar General, said to this deponent, "No you will not: you are not permitted to appear; and, Mr. Townsend, you know perfectly well, as an ecclesiastical practitioner, that you are not able to bring in a libel until you are permitted to appear." And this deponent saith, that the said Vicar General, then and there, wholly refused to permit this deponent to appear, as proctor as aforesaid, for the said three opposing parties, or any of them, or to exhibit his aforesaid proxies, or to

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present or bring in any libel, or plea, or objections against the confirmation of the said election of the said Doctor Hampden, or to do any act whatsoever in opposition to the confirmation of the said election, although the said proxies and libel were in due form of law, according to the usage and practice of the said Court, and although this deponent, then and there, duly and at the proper time, according to law, offered and proposed to appear as proctor for the said opposing parties, in the matter of the said opposition to the said confirmation, and to exhibit the said libel. And this deponent further saith, that he had instructed certain advocates or counsel, namely, Doctor Addams, and Doctor Harding, and Doctor Robert Phillimore, to appear on behalf of the said opposing parties, and oppose the confirmation of the said election; and the said advocates or counsel then appeared accordingly, and required to be heard; whereupon the said Vicar General inquired of the said Doctor Addams whether he wished to be heard upon the question, whether counsel had a right to be heard or not; and the said Doctor Addams having replied that he did, the said Vicar General said, "We confine you to that;" and the said Doctor Lushington also then said to the said Doctor Addams, "Distinctly understand to what you are confined, namely, the question, whether, considering the statute of Henry the Eighth, which has been referred to, you have a right, notwithstanding that statute, to be heard at all," or words to that effect. And this deponent further saith, that thereupon the said advocates or counsel were heard at length, upon the said question, whether they were entitled to appear and be heard; and that when they had concluded, one Doctor Bayford, as counsel on behalf of the said Doctor Hampden, and of the said Dean and Chapter of Hereford, or one of them, rose to reply to the observations of the said advocate or counsel, but the Court stopped him, and proceeded to give judgment, and decided that they could not hear any objections to the confirmation of the said election, and that they were precluded, by the said statute, from allowing any such objections to be entertained; the said Vicar General delivering his judgment to the effect following, that is to say, he was of opinion that the Court was bound to proceed to the confirmation of the election of Doctor Hampden to the Bishoprick of Hereford, under the provisions of the statute of the 25th year of King Henry the Eighth, which clearly extended to the present case, and by which, if he should commit or suffer any let or hindrance to such confirmation, he should become liable to the penalties of *præmunire*; that the act itself prescribed no mode of proceeding in the performance of the duty enjoined, nor referred to any; and that the said Court was bound by the statute law of the realm, which afforded it no alternative, but that of confirming the election, which was certified to have been made by the Dean and Chapter of Hereford, or subject themselves to the penalties of *præmunire*. And the said Doctor Lushington, and the said Sir John Dodson, as such assessors as aforesaid, then also severally expressed their opinions, that the said opposers, their proctor, or counsel, could not be allowed to appear or be heard, by reason of the said statute of the 25th year of the reign of King Henry the Eighth. And this deponent further saith, that after the said judgment had been so given, the following proceedings took

place, that is to say, the said Vicar General directed the said confirmation to be proceeded with, according to the usual form; whereupon the said Proctor of the said Dean and Chapter openly said in the presence and hearing of the said Court: "I accuse the contumacy of all and singular persons cited, intimated, publicly called, and not appearing, and, in pain of such of their contumacy, pray that they and every of them be precluded from the means of further opposing against the said election, the manner thereof, or the person elected in this behalf; and also that it may be decreed to be proceeded to further acts in this business of confirmation, the absence or contumacy of the persons so cited, intimated, publicly called, and not appearing, in anywise notwithstanding; and I porrect a schedule, which I pray to be read." And this deponent further saith, that the said proctor then handed in a paper to the said Vicar General, which the said Vicar General then read and signed, the contents of which are unknown to this deponent; and then the said proctor proceeded, and stated as follows: "In pain of the contumacy of all and singular persons cited, intimated, publicly called, and not appearing, I give this summary petition in writing, which I pray to be admitted; and that it be decreed to be proceeded summarily and plainly, and that a term be assigned me to prove the same immediately." And this deponent further saith, that the said Vicar General replied as follows: "We do admit this your summary petition, so far as the same may be by law admitted, and do decree that it may be proceeded summarily and plainly; and we do assign you a term to prove this your summary petition immediately," or words to that effect; whereupon the said proctor then said: "In pain of the contumacy of all and singular persons cited, intimated, publicly called, and not appearing, and in support of proof of the matters contained in my said summary petition, I exhibit a certificate, touching and concerning the election of the aforesaid Reverend Renn Dickson Hampden, Doctor of Divinity, to be Bishop and Pastor of the said Cathedral Church of Hereford, made by the said Dean and Chapter of the said Church, and issued under their common seal. I likewise exhibit a public instrument of the consent of the said Doctor Renn Dickson Hampden to the said election, and her Majesty's letters patent before read. And I allege, that all and singular the matters set forth in the said exhibits respectively were and are true, and so had and done as therein contained; and I pray all of them to be admitted, and that a term be assigned me to hear sentence instantly." And this deponent saith, that the said Vicar General then said as follows: "In pain of the contumacy of all and singular the persons so as aforesaid cited, intimated, publicly called, and not appearing, We do admit these public instruments, and do assign to hear sentence instantly;" that the said proctor then said: "I pray all and singular the said opposers to be again publicly called;" that the Vicar General then said: "Let the opposers be again publicly called;" and that the said Apparitor General then made his proclamation as follows: "Oyez! Oyez! Oyez! All ye who shall or may or will object to the confirmation of the Reverend Renn Dickson Hampden, as Lord Bishop of the Episcopal See of

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“ the Cathedral Church of Hereford, now come forward and state
“ your objections, and you shall be heard :” That after such pro-
“ clamation made, the said proctor then said, “ I accuse the con-
“ tumacy of all and singular the persons so as aforesaid cited, inti-
“ mated, publicly called, and not appearing ; and I pray them to
“ be pronounced contumacious, and, in pain of such their con-
“ tumacy, that it be decreed to be proceeded to the pronouncing
“ your definitive sentence ; and I porrect a schedule which I pray
“ to be read.” And this deponent saith that the said proceedings
then terminated, by the said Doctor Hampden taking the oaths
usual and required in such cases ; and the said Vicar General
signed, promulgated, and gave the following sentence in writing,
that is to say, “ In the name of God, Amen. We Sherrard Beau-
“ mont Burnaby, Doctor of Laws, Vicar General and Official Prin-
“ cipal, lawfully constituted of the most Reverend Father in God,
“ William, by Divine Providence, Lord Archbishop of Canterbury,
“ Primate of all England and Metropolitan, being hereunto suffi-
“ ciently and lawfully authorized, and having heard, seen, under-
“ stood and discussed the merits and circumstances of a certain
“ business of confirmation of an election made and celebrated of
“ the Reverend Renn Dickson Hampden, D.D., elected Bishop
“ and Pastor of the Cathedral Church of Hereford, which is con-
“ troverted and remains undetermined before us in judgment, and
“ having considered the whole process had and done in the business
“ of such confirmation, and having observed all and singular the
“ matters and things that by law in this behalf ought to be observed,
“ we have thought fit, and do thus think fit, to proceed to the
“ giving our definitive sentence or final decree in this business, in
“ manner following. Whereas by the acts enacted, deduced, al-
“ leged, propounded, exhibited, and proved before us, relating to
“ such confirmation, we have amply found, and do find, that the
“ said election was rightfully and lawfully made and celebrated by
“ the Dean and Chapter of the said Cathedral Church of Hereford,
“ of the said Reverend the Bishop elect, a man both prudent and
“ discreet, deservedly laudable for his life and conversation, of a
“ free condition, born in lawful wedlock, of due age, and an ordained
“ priest, and that there neither was nor is anything in the ecclesi-
“ astical laws that ought to obstruct or hinder his being confirmed
“ by our authority Bishop of the said See ; therefore we Sherrard
“ Beaumont Burnaby, Doctor of Laws, the judge aforesaid, having
“ weighed and considered the premises, and with the assistance of
“ the learned in the law, do, by the authority wherewith we are
“ invested, confirm the aforesaid election made and celebrated of
“ the person of the said Reverend Renn Dickson Hampden,
“ Doctor of Divinity, to the Bishoprick of Hereford. And we do,
“ so far as in our power and by law we may, supply all defects in
“ the said election, if any there happen to be. And we do commit
“ unto the said Bishop elected and confirmed the care, government,
“ and administration of the spirituals of the said Bishoprick of Here-
“ ford. And we do pronounce, decree, and order, by this our defini-
“ tive sentence, or final decree, which we make and publish in these
“ presents, that the said Bishop so elected and confirmed, or his
“ lawful proctor for him, shall be inducted into the real, actual, and

“corporal possession of the said Bishoprick, and of all its rights, dignities, honours, privileges, and appurtenances whatsoever, and be installed and enthroned by the Archdeacon of Canterbury, or his deputy, according to the laudable and approved manner and custom of the said Cathedral Church, not being contrary to the laws and statutes of this realm.” And this deponent further saith, that the proctor then said:—“The Lord Bishop elected and confirmed, and myself, pray a public instrument and letters testimonial to be made out, of and concerning the premises;” whereupon the Vicar General said—“We do decree as prayed.” And this deponent further saith, that the forms and proceedings used and adopted in the said business or matter of the said confirmation, were of the same tenor and description as the forms and proceedings used and adopted in suits and causes in the ecclesiastical courts, and that the same forms of citations, proclamations, summary petitions, or plea, proofs, sentence, and other forms, as were used and adopted in the said business or matter, have been, to the best of this deponent’s information and belief, commonly used in the confirmations of the elections of bishops in England, ever since the said statute of the 25 Hen. 8 was revived in the reign of Queen Elizabeth. And both these deponents further say, that the opposition, so intended to be made to the then present confirmation of the election of the said Doctor Renn Dickson Hampden to the Bishoprick of Hereford, was founded upon two books written, printed, and published by him; the avowed purport or object of the first of the said two books being to illustrate the injurious effects of dogmatism in Theology; and in both books, in illustration of the (supposed) effect of dogmatism in Theology, it is well known, or justly suspected, that, whether so by him intended or not, he hath, in fact, spoken or declared in the manifest derogation or depraving of many things in the Book of Common Prayer, and hath maintained or affirmed divers doctrines repugnant, or at least contrary to the Thirty-nine Articles of the Church of England, especially those or most or many of them particularly concerning faith and doctrine. And these deponents further say, that expressly by reason of or with reference to such two books aforesaid, he the said Doctor Renn Dickson Hampden (then recently appointed Regius Professor of Divinity in the University of Oxford), in the year of our Lord 1836, incurred the solemn censure of that University, and which censure (the said Doctor Renn Dickson Hampden neither then nor since having, in any manner, explained or renounced or retracted those parts of his teaching which have led to his being so justly suspected as aforesaid) was in effect re-affirmed by the said University, in the year of our Lord, 1842. And these deponents further say, that articles, alleging and setting up unsoundness of doctrine and teaching by the said Doctor Renn Dickson Hampden, had been prepared and signed by certain learned civilians, ready to be given in as aforesaid, had the said parties been permitted to appear, and which these deponents are advised and believed to present and contain sufficient ground of opposition to the confirmation of the said Doctor Renn Dickson Hampden, and this deponent, the said Richard Edward Austin Townsend, was ready to bring in, in due

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form of law, as aforesaid, and then and there, if called on so to do, to sustain by proof.

“And this deponent William Frederick Powell for himself further saith, that this application for a mandamus is made with the consent and concurrence of the said Reverend Richard Webster Huntley, and the Reverend John Jebb, the aforesaid other opposers to the said confirmation of the said election of the said Dr. Hampden.

“Sworn, &c.”

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Sir *Fitzroy Kelly*. If your Lordship pleases, I am instructed to move for a rule to show cause, why a mandamus should not issue, directed to the Lord Archbishop of Canterbury, and to Dr. Burnaby, his Vicar General, commanding them, or one of them, at a Court to be therefor duly holden in the cause, or business, or matter of the confirmation of the election of the Rev. Renn Dickson Hampden, D.D., to the Bishoprick of Hereford, to permit and admit to appear, in due form of law, the Rev. Richard Webster Huntley, Clerk, M.A., of the University of Oxford, Vicar of Alberbury in the county of Salop, and diocese of Hereford; the Rev. John Jebb, Clerk, M.A., of Trinity College, Dublin, Rector of Peterstow, in the county and diocese of Hereford aforesaid; and the Rev. William Frederick Powell, Clerk, M.A., of the University of Cambridge, perpetual Curate of Cirencester, in the county of Gloucester, to oppose the said confirmation of the said election of the said Dr. Renn Dickson Hampden, and to hear and determine upon such opposition, and upon the articles, matters, and proofs thereof.

My lords, this application involves a question, undoubtedly of the very first importance, which has been raised in the late proceeding relating to the confirmation of the Bishop of Hereford; a question which, I doubt not, your lordships will think ought to be very deliberately considered, and to be determined by the court.

General nature
of the proceed-
ings on con-
firmation.

Your lordships are aware that upon the election of any individual to a vacant see by the dean and chapter, under the *Congé d'élire*, and upon the return or certification of that election to the Crown, the Sovereign issues letters patent, commanding the archbishop of the province to proceed to the confirmation of the person who has thus become bishop elect; and, by the law and usage which has prevailed, with respect to these important proceedings, in this country, now for many centuries, and prevailed without variation or interruption, upon the letters patent being received by the Archbishop, he proceeds, either in person, or, as most commonly takes place, by his Vicar General, to hold a court, at which the business of the confirmation is transacted, and brought to a close. My lords, I shall have to bring under your lordships' attention the various forms and matters constituting that proceeding; but among them, perhaps the most important of all is, that, at some reasonable and convenient time, before the court for the purpose of confirmation shall be held, it is necessary to publish a citation (*t*) calling, in some instances specifically by name, upon persons to come in and oppose the confirmation of the bishop, if there be ground for such opposition; and where the case is not such as to require that the citation shall be

directed by name to particular individuals, it is a general citation, calling upon all persons to come in and oppose, if there be good ground of opposition, the confirmation of the bishop elect. The court is held, and the various proceedings take place, for the purpose of the confirmation; and the bishop elect has to propound, by way of petition (*u*), his case for confirmation: he has to state various matters and things; the fact of his election, under the *Congé d'élire*; the mandate, or letters patent, of the sovereign, to the archbishop, to proceed to the confirmation; and he has also to state and to prove his fitness, in point of learning, doctrine, and piety, and other qualifications, for the office to which he has been elected; and it is then the duty of the court, whether the archbishop in person, or his Vicar General, to proceed under the citation which has been published, and solemnly to make proclamation calling upon all persons, who shall have ground of opposition, to come in and oppose the matter of that petition, and oppose the confirmation of the bishop elect. If no one appears, all persons are declared to be contumacious: and upon the non-appearance of any one opposing the bishop, the archbishop or his Vicar General, is bound then to examine into the matter of the petition, and the allegations of the bishop elect. If satisfied, (and in default of opposition, the proof is easy), the confirmation proceeds. The matters of the petition to be proved are; that the bishop elect has been in fact duly elected by the dean and chapter; that that election has been duly certified to the crown, and the crown has approved of the election, and has issued the letters patent commanding the archbishop to proceed to the confirmation. And if likewise, upon examination and, if need be, upon discussion, the court be likewise satisfied of the truth of the allegation, that the bishop is, in all respects, as to learning, piety, doctrine and conduct, birth, and other matters, duly competent, and qualified to be confirmed as a bishop of the church of England, then there is, after certain other proceedings that I need not now further advert to, a decree—a formal and solemn decree (*v*)—pronounced, confirming the bishop, and also directing that a mandate shall issue to the archdeacon of the province, for the purpose of installing and enthroning the bishop.

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Now this being the general nature of the proceedings, the question that your lordships will have to determine, under the circumstances which have taken place with respect to the Rev. Dr. Hampden, is, whether the practice, which has prevailed under the canon law, (which for that purpose has become part of the common law of England for a great many centuries),—

Mr. Justice PATTESON. Will you do me the favour to raise your voice: I cannot quite catch what you say.

Sir F. Kelly. I was about to state, that the question that is raised upon these proceedings is, whether the usage, which has prevailed, according to the canon law, (and, for this purpose, the canon law has become part of the common law of the realm, for many centuries), of citing all opposers, and, if opposers appear, of hearing, and discussing, and determining on evidence, and after due deliberation, (among other things) upon the fitness and competence of the bishop elect to be confirmed as a bishop—the question to be determined is,

(*u*) *Supra*, p. 74.

(*v*) *Supra*, p. 79.

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whether this is altogether worse than a useless form; whether it is a mere mockery and a delusion, and whether if, after this public and general citation and proclamation, persons—the clergy of the diocese and others—deeply interested in the proceedings in question, interested in the character and fitness in all respects of the individual to be appointed their bishop,—bishop over them—come forward and, in due form of law, make and offer opposition, and propose to verify the matter of that opposition, according also to the usual and accustomed modes of the law,—the question is, whether all that is to be set aside; and whether, under the statute of Hen. 8, (to which I shall hereafter have to call your lordships' attention), although these forms are in fact to be gone through, the Court is prohibited from inquiring into the very matter which they are assembled to inquire into; and not merely at liberty, but are compelled, to reject all opposition, to deny a hearing to all parties, and—fit or unfit—without inquiry, and without evidence, to proceed at once to confirm the individual in question, as bishop of the diocese.

Now, I think I shall not have the smallest difficulty, when I shall have drawn your lordships' attention, as I am bound to do, first, to what has taken place upon this occasion, next, to the forms pointed out in all books of authority on the proceedings in question; when I shall then have referred your lordships to the terms of the statute, passed for a purpose wholly foreign to the business of confirmation and to the necessary and proper inquiries into the fitness of the person to be confirmed, and when I shall have referred your lordships to the authorities to be found upon the subject, (and it will be seen that those authorities are uniform). I shall have no difficulty in showing that not only is there no authority for saying, that this inquiry is not to take place, or that persons shall not be heard, or that evidence shall not be entered into; but it will become perfectly manifest and clear, from the long course of authorities upon the subject, and from the best writers upon the canon law and upon the common law in this kingdom, that not only must these forms be observed, and this inquiry and this judgment take place, but if there be any failure in any material part of that proceeding, the confirmation of the individual, as bishop, is altogether void in law.

Now, my lords, it may be convenient I should state to your lordships, in order that it may be quite clear, first, what the proceedings were upon the occasion, and next, that all that could be done has been done by those who, from the deep interest they have in the case, have felt it their duty to come in and put the gentleman in question upon proof, and the court upon examination, of his fitness. I will call your lordships' attention, in the first instance, to the statement of the proceedings, as appearing upon the affidavit.

Statement of
the proceed-
ings, as ap-
pearing upon
the affidavit.

I may shortly say, that, upon the 28th of December, last, the Rev. Dr. Hampden was, under the *Congé d'élire* which her Majesty was pleased to issue, elected by the Dean and Chapter of Hereford, the bishop of that see. The election, I presume, was duly certified to the crown; and the usual mandate, or letters patent, then issued, for the confirmation of the bishop elect. I shall have, my lords, hereafter to call your lordships' attention to one part of that document. I will now content myself with observing that the confirmation was appointed to take place at Bow Church, on the 11th of this present

month of January. The citation (*w*) had been duly published, calling upon all persons to come and oppose the confirmation, who should have proper ground of opposition; and the affidavit proceeds to state, that this deponent (that is, one of the three clergymen mentioned) and the other two, "being minded, and of opinion, and verily believing that good and valid objections existed to the confirmation of the election of the said Dr. Hampden to the said see and bishoprick of Hereford, they resolved and determined to oppose such confirmation." Your lordships are probably aware, that in all these proceedings before the Vicar General, or in any proceedings in the like manner, all parties who appear can only be heard through their proctor; and the usual course is this; proxy being given to the proctor, for the proctor to exhibit his proxy, and to appear and demand to be heard. This gentleman has given his proxy accordingly. The proctor says; "in obedience to such letters patent, and according to the usual course of proceeding in such cases, the said archbishop, by his Vicar General, the Right Worshipful Sherrard Beaumont Burnaby, LL.D., Vicar General of the province of Canterbury, assisted by the Right Honourable Stephen Lushington, LL.D., and Judge of the Consistorial Court of London, and Sir John Dodson, LL.D., and Master of the Faculties, as assessors, for the purpose of proceeding with the cause, business, or matter of the said confirmation, proceeded in the said cause, business, or matter, in manner next hereinafter mentioned. And this deponent further saith that the said See of Hereford is within the province of the said Archbishop of Canterbury, and that the court of the Vicar General of the said archbishop for the confirmation of bishops elected within that province has, from time immemorial, been held at the church of St. Mary-le-Bow in the city of London, and that the said Vicar General, so assisted as aforesaid, proceeded with the said cause, business, or matter of the said confirmation, as hereinafter more particularly mentioned, and on Tuesday the 11th day of January, 1848, a citation or mandate against all and singular opposers, calling upon them to appear and make their objections at the said court, on the day last aforesaid, having been first duly published in the said church, on or about the 8th day of January aforesaid, and a copy thereof having been affixed, and for some time left affixed, to the door of the said church, according to the law and practice of the said court. And this deponent further saith, that the said Vicar General and assessors assembled in the dining room adjoining the Common Hall of Doctors' Commons." And then certain proceedings, before entering upon the business and the holding of the court in church, are set forth, with which I do not propose to trouble your lordships, but "that they attended at and in the said church of St. Mary-le-Bow in the said city of London, on the said 11th day of this present month of January, when and where the court for the confirmation of the election of the said Dr. Hampden as Bishop of Hereford was held, before the said Right Worshipful Sherrard Beaumont Burnaby, the said Vicar General, assisted by the said Dr. Lushington and Sir John Dodson, as his assessors, as aforesaid, and that, after prayers had been duly read, the business of the said con-

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firmation of the said Dr. Hampden to be bishop of the said diocese of Hereford, was commenced and proceeded in, by the presentation to the aforesaid Vicar General of the aforesaid letters patent of her Majesty, of the 6th day of January, 1848, which said letters patent were read; whereupon Mr. Richard Underwood, the chapter clerk of the dean and chapter of the cathedral church of Hereford aforesaid, prayed the said Vicar General to take upon himself the duty of the said confirmation, and decree that the same be proceeded in, according to the form of the said letters patent and exigency of the law; and the said Vicar General having signified his assent thereto, the said Dr. Hampden was presented to the said Vicar General by the said Mr. Underwood, who then declared that he judicially produced the said Dr. Hampden as Bishop elect of Hereford; and the said Mr. Underwood further stated, that as proctor for the said dean and chapter, he also exhibited an original mandate, together with the certificate, thereupon indorsed, touching the execution of the said mandate, against all and singular opposers, and prayed that such opposers might be publicly called. And these deponents further say, that the said Vicar General thereupon directed the apparitor general of the said court then present, to make proclamation, as is usual in such cases; whereupon the said apparitor general made proclamation, in open court, in the said church, in the words following, that is to say—"Now I pray your lordships' attention to the form of the language in this proclamation, which appears to be the same as that which has been adopted, I believe I may say, without a single exception or variation, for a great many centuries, certainly since the passing, or rather the revival, of the act of Henry 8, in the reign of Queen Elizabeth—"Oyez! Oyez! Oyez! all manner of persons who shall or will object to the confirmation of the Rev. Renn Dickson Hampden, D.D., to be Bishop and Pastor of the Cathedral Church of Hereford, let them come forward and make their objections in due form of law, and they shall be heard." The affidavit states, that immediately after such proclamation was made, and before any other proceedings were taken, Mr. Townsend addressed the Vicar General and stated, that "he appeared as proctor for the Rev. R. W. Huntley, Clerk, M.A., of the University of Oxford," and the other gentlemen who are named, and that he "exhibited proxies under the hands and seals of the said three last named parties respectively, and then declared that he opposed the confirmation of the election of the said Dr. Renn Dickson Hampden to the office or dignity of Bishop of Hereford aforesaid. And this deponent Richard Edward Austin Townsend for himself further saith, that upon the deponent addressing the said Vicar General, as last aforesaid, the said Vicar General inquired of the deponent what were his objections, or used words to that effect. And this deponent saith that he had such objections in writing then in his possession, and that whilst the deponent was in the act of presenting such objections, which were in the form of a libel or plea and were duly signed by advocates, as is usual in such cases, the said Vicar General said to this deponent, "We are acting here under "a mandate from the crown issued pursuant to the provisions of the "statute of the 25 Hen. 8, c. 20; and we consider ourselves bound "to confirm without suffering any opposition," or words to that

effect. And this deponent then said, in answer to the said inquiry of the said Vicar General, "Right worshipful, I bring in a libel," or words to that effect, this deponent understanding that he was assigned by the said Vicar General so to do; Whereupon the said Dr. Lushington, one of the assessors of the said Vicar General, said to this deponent, "No you will not: you are not permitted to appear; and Mr. Townsend, you know perfectly well, as an ecclesiastical practitioner, that you are not able to bring in a libel until you are permitted to appear." And this deponent saith, that the said Vicar General then and there wholly refused to permit this deponent to appear as proctor as aforesaid, for the said three opposing parties, or any of them, or to exhibit his aforesaid proxies, or to present or bring in any libel, or plea, or objections against the confirmation of the said election of the said Dr. Hampden, or to do any act whatsoever in opposition to the confirmation of the said election, although the said proxies and libel were in due form of law, according to the usage and practice of the said court, and although this deponent then and there, duly and at the proper time, according to law, offered and proposed to appear as proctor for the said opposing parties, in the matter of the said opposition."

My lords, I need not trouble you with any further portions of the affidavit. Upon this, certain learned advocates, appearing on behalf of the opposing parties, claimed to be heard—claimed to be admitted to appear and to be heard, in opposition. The court refused to hear them,—refused to hear any argument at all, except upon the preliminary question, whether they were entitled to appear, and entitled to be heard at all. Upon that preliminary question, they were permitted to address the court: they argued the question of the right to appear, upon the statute, and upon the canon law and the common law of England. Without hearing any argument on the other side, the court was pleased to determine, that, by reason of the act of parliament, they had no discretion and no power to hear any opposing parties, either by way of articles, allegations, arguments, or proof; that they were bound—at least it was the opinion of two out of the three, the third having some doubt upon the point—but two, out of the three, thought that they were bound, under penalties of *præmunire*, to reject all opposition, denying all parties the right to be heard, and at once to proceed, and simply and implicitly obey the command of the crown to confirm the bishop; they understanding the word "confirming" to be (except going through the form I have adverted to) not to enter into argument, discussion, examination, or proof of any of the matters of this petition, or that part of it which related to the fitness and qualifications of the bishop elect, but that they are bound to confirm. And they did accordingly pronounce the sentence of confirmation.

Now I have to submit to your lordships, therefore, that upon the authorities, it is free from all description of doubt, that under this statute (I will not say notwithstanding this statute, but that under the statute), and by the canon law, and the common law of this realm, the ceremony of the confirmation of a bishop is a regular judicial proceeding, and that it is a necessary and essential part of that proceeding, that the archbishop or his Vicar General who con-

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firms (who in fact constitutes the court for that purpose), should proceed to examine and inquire into, amongst other things, the fitness and qualification of the bishop elect; should, if called upon so to do, enter into evidence on the one side and on the other; and must hear, pursuant to citation and proclamation, all persons who come forward, having, or pretending to have, ground of opposition, if they shall make their opposition according to the due form of law; and that if they refuse to enter upon that inquiry,—if they deny to any parties, competent and having the right, under such circumstances, to be heard, the privilege of being heard accordingly, that there they exceed their jurisdiction, and deny them justice; and that their proceedings, from that time forth, are altogether null and void, in point of law.

Now, my lords, before I refer to the statute, it may be convenient that I should call your lordships' attention to *Burn's Ecclesiastical Law*, vol. 1, p. 205; where, under the statute (taken in connection with the canon law and common law) the whole form of proceeding, which the law requires, is very distinctly given. In the 14th article, which treats of confirmation, the author states:

"The method and order of confirmation will be best understood by a brief account of the several instruments exhibited and applied in the course of it:

"(1) The king's letters patent; by which the royal assent to the election is signified, and the archbishop required to proceed to confirmation."

That is the first document; and I will now call your lordships' attention to that document itself, which is supposed to be the command not to enter into any inquiry or examination, or to go through any forms at all, but to do, as it were, the ministerial act of confirmation, the not doing of which is to subject the judge or judges of the court to this high penalty. My lords, the mandate, or letters patent, after reciting the election of the individual in question by the dean and chapter, the certification of that election, and the approbation of the crown, proceeds in these terms: "We, accepting of such election, have given our royal assent thereto, and this we signify unto you by these presents, requiring and strictly commanding you, by the faith and allegiance by which you stand bound to us, to confirm the said election, and to consecrate the said Renn Dickson Hampden, so as aforesaid chosen to be bishop of the said see, and to do, perform, and execute, with diligence, favour, and effect, all and singular other things which belong to your pastoral office, according to the laws and statutes of England." So that your lordships observe, this is not a mere ordinance or direction to confirm. If it were indeed, the question would still remain, what is the meaning of the word "confirmation;" whether that does not import, and contain within itself, and include, all the necessary steps,—all those steps which must, previously, and in course of confirmation, be taken by the Court in question, and, amongst others, the necessary and proper inquiry into the party's qualification? But your lordships find that, in that ordinance, the archbishop is commanded, with diligence and so forth, "to do, perform, and execute, all and singular other things which belong to your pastoral office;" that is, in relation to the matter in hand.

Now your lordships will see, then, as we proceed, what those things are, and what it is of which the *business*,—as it is called in the ecclesiastical-law writers,—the business of confirmation consists. After the king's letters patent there is,

“(2) A citation against opposers; which (the time of confirmation being first fixed) is published and set up, by order and in the name of the archbishop, at the church where it is to be held; as well to notify the day of confirmation, as to cite all opposers (if any there be) who will object against the said election, or the person elected, to appear on that day, according to the direction of the ancient canon law.”

Your lordships will find, then, that *Burn*, who is writing since the statute, and pointing out the course of proceeding under the statute, following every text writer who has treated on the subject, mentions, as the second instrument in the course of this proceeding, the public citation. My lords, I have not the exact form of that citation (*x*); but it is, in substance, to be collected from a note to *Gibson's Codex*, vol 1, p. 110, where he treats of the manner of electing, confirming, and consecrating. Speaking of the citation he says, “*Citatio contra oppositores*—which (the time of the confirmation being first fixed) is published and set up, by order and in the name of the archbishop, at the church where it is to be held; as well to notify the day of confirmation, as to cite *omnes et singulos oppositores (si qui sint) in specie, alioquin in genere, qui contra dictam electionem, formam ejusdem, personamve in hac parte electam, dicere, objicere, excipere, vel opponere voluerint*, to appear on that day.”

And it is this which is now supposed to be a worse than useless form. This citation published in a reasonable and convenient time before the day of holding this court for confirmation, calling upon all persons, who have grounds of opposition, to come in and oppose, is supposed (although it has been in use for 300 years) to be a mere form which cannot be obeyed; so that if the persons come in to oppose, under this citation, they shall not be heard.

Then the third document is, “The certificate and return, made by the proper officer to the archbishop, of the due execution of the said citation.

“(4) The commission to confirm; which is usually performed by the archbishop's Vicar General.

“(5) The proxy of the dean and chapter; by which one or more persons are delegated by the dean and chapter electing, not only to present in their names the instrument of election to the bishop elected, to obtain his consent, and to present the letters certificatory of election to the king, and to pray the royal assent in order to confirmation; but also at the time of confirmation (the said letters patent and commission to exhibit such his proxy being first read) in virtue thereof to present the bishop elected to the archbishop, vicar general, or surrogate; and, in the course of confirmation, to do whatever else is necessary to be done on the part of the dean and chapter.

“(6) The first schedule: the said proctor in the name of the dean and chapter, exhibiting the citation and return above men-

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(x) Vide *supra*, p. 20

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tioned, prays that the opposers (if any be) not appearing, may be pronounced contumacious, and precluded from further opposition, and that the confirmation may be proceeded in; which is accordingly done by this schedule."

It is at this period that, when the certificate is brought into court publicly, (the citation to which I have alluded having been duly published) the Court is prayed to declare all persons contumacious who ought to oppose, and fail to come in and oppose. And before that can be done,—before that decree, that they are contumacious, can be made,—it is, that the proclamation, in the form to which I have already called your lordships' attention, is made; in which, once again, all manner of persons who shall object to the confirmation, are explicitly and publicly called upon to appear; but the proclamation concludes, "And make their objection in due form of law, and they shall be heard." That proclamation, therefore, according to what is here laid down as an invariable practice, was made upon this occasion; for all persons having ground of opposition, are called upon to come in and oppose, and they are told that they shall be heard. And then it is, that those who (upon grounds that, if well founded in point of fact, are amply sufficient and proper grounds of opposition) do come forward and oppose, are then told, they cannot be heard!

Then follows, the "Summary petition: That is a petition of the proctor, that the bishop elect may be confirmed, upon his alleging and proving—." Now your Lordships will permit me again to pause here for a moment. In the first stage of this proceeding, when the citation is proved, and proclamation made, and no one comes in to oppose; even then, so far from this being an absolute and peremptory command to do an act ministerially, and without inquiry, without proof, without discussion; (and not by way of decision and judgment—far from it) even after all this, and in default of opposition, the bishop is, through his proctor, to present his petition, in which he is to allege and prove the several matters which are here mentioned; that is, first, "the regularity of the election, and the merits of the person elected; which he doth in nine articles; setting forth, first, that the see was vacant, and had been vacant for some time. Secondly, that the dean and chapter had first desired and obtained the royal licence, appointed a day for election, and duly summoned all persons concerned. Thirdly, that, on that day, they unanimously chose the person now to be confirmed. Fourthly, that the election was duly published and declared to the clergy and people there assembled. Fifthly, that at the request of the dean and chapter, the person so elected, gave his consent to the election. Sixthly," (this is what the bishop himself has to propound and to prove), "that the person elected is sufficiently qualified by age, knowledge, learning, orders, sobriety, condition, fidelity to the King, and piety. Seventhly, that the dean and chapter, under their seal, intimated the election, and the name of the person elected, to the King. Eighthly, that the King had given the royal assent. Ninthly, that he had, by his letters patent, required the person elected to be confirmed."

So that your lordships see, even where there is no opposition, here is proof required, on the part of the bishop elect, of his fitness,

in point of piety. He is to exhibit that proof, and he does exhibit that proof, in support of this petition. And yet it is now to be said, that, after this called for opposition, those who, if they have ground for opposition, have a deep interest in opposing, (and that for many reasons, some of which I may have to urge upon your lordships' consideration by and by) are not to be permitted to oppose that proof by counter proof;—that in fact they are not permitted to be heard at all!

Then there follows this:—"All which articles conclude with a petition, that in pursuance of the premises, confirmation may be decreed.

"Then the summary petition is admitted, and the Court decrees to proceed thereupon, and assign him a term immediate, to prove the particular matters contained in the petition; for proof of which he exhibits the process of the election made by the dean and chapter, the consent of the archbishop or bishop, and the royal assent; and then prays a time to be presently assigned for final sentence; which is decreed accordingly.

"(8) The second schedule: Before sentence, a second præconization of the opposers (if any be) is made at the fore-door of the church, and (none appearing) they are declared contumacious by a second schedule."

So your lordships observe, the petition of the bishop is put in, and, either before or after, proof is given in support of that petition; among other topics, the proof of fitness. Again is there a proclamation, for parties to come in; and again a declaration to them that they shall be heard.

Now, my lords, it may be as convenient now, while the book is in my hand, as hereafter, to call your lordships' attention to the case which is here mentioned of what actually occurred, where an opposition was offered. My lords, with the exception to which I am now about to advert, and which is here cited in *Burn's Ecclesiastical Law*, I believe this is a single and isolated instance, and I venture to hope that it will be so, in all times to come, of an opposition being offered to the individual whom her Majesty is advised to recommend for confirmation as a bishop. But there was, in the instance which is here adverted to, an opposition. Your lordships will find from the record, such as it is, of what took place on that occasion, that while it never was contended but that, if the opposition had been made in due form of law, and had been well founded, it must have succeeded and must have prevailed, it was rejected only because it was not made according to the due and usual forms of law; and thus the proceeding failed. The writer proceeds:—

"But if any appear, it seemeth that they shall be admitted to make their objection in due form of law. To which purpose a passage in *Collier's Ecclesiastical History*, vol. 2, p. 745, is applicable. [Here the learned counsel read the extract from *Collier* relating to Mountague's confirmation, cited at length by Dr. *Addams*, *supra*, p. 45, which is quoted by *Burn*]. I have already stated to your lordships, that upon all these proceedings, by an inferior court of Ecclesiastical jurisdiction, it is necessary upon any article being given in any libel, plea, or other proceeding, even upon the appearance of

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any party, it is necessary that it should be done through a proctor properly instructed under proxy: and also that the article to be delivered in should be in writing, and signed by an advocate of the court. This was not done in the present instance; and "upon the failure of these circumstances, the confirmation went on." *Burn* adds, "the parliament, not at first apprized in point of form, were dissatisfied with the conduct of the Vicar General, and inquired into the behaviour of Dr. Rives on that occasion.—Upon which it hath been observed, that Dr. Rives, a most eminent civilian and canonist, admitted that the opposition was good and valid, had it been legally offered; and that the parliament of that time proceeded upon the same opinion."

Now, my lords, I am aware that it has been said (*y*), that this precedent occurred in troubled times, and when no great weight is to be attached to the proceedings or decisions of any court. There is some mistake in point of date in that. This took place about 1628. It took place at a time then, long before the decisions of the courts can be impeached by reason of any troubles existing, anything tending to overawe the judges in the discharge of their duties; and at a time, when there was no reason, therefore, I apprehend, why the law should not be fairly and accurately administered. It was a great many years before the Civil War broke out, and when law and justice were as well administered, in our courts, as during any period of the early part of that century.

The next proceeding is the taking of the oaths: and they are four in number, and they are described. Then there is "(10) The definitive sentence, or the act of confirmation, by which the judge committeth to the bishop elected, the care, governance, and administration of the spiritualities; and then decrees him to be installed or inthronized. . . . And this is performed (in the province of Canterbury) by mandate from the archbishop, to the archdeacon of Canterbury; to whom the right of installing the bishops of that province hath anciently belonged, and doth still belong."

Now your lordships observe, upon this somewhat lengthened extract, with which I have troubled the court, from *Burn's Ecclesiastical Law*, what the form of proceeding is, and always has been, in those cases. It is remarkable that, so far from its being supposed that the act of parliament has at all altered, either in form or in effect, any portion of the proceedings, or altered the nature of the duty of the court before which this proceeding of confirmation takes place, this writer and other writers all refer not only to the statute, and point this out as the mode of proceeding invariably adopted since and under the statute, but also to the canon and common law.

Review of the
stat. 25 Hen. 8.

My lords, upon the statute to which I am now about to advert, and upon which, as I most humbly submit to your lordships, this court has most erroneously proceeded, when this statute comes to be considered, it will really be found, in relation to the form of proceeding, that the object of this act of parliament (which was passed in the reign of Hen. 8; altered—repealed in fact, to a certain extent—in the reign of Edw. 6; entirely repealed in the reign of Queen Mary; but altogether revived in the reign of Queen Elizabeth),

(*y*) *Supra*, p. 59.

was for the mere and sole purpose of preventing reference to the Pope, or Bishop of Rome, as he is called, in relation to the confirmation of the bishops. It was merely to prevent that, perhaps, which it was one of the great objects of the Reformation to put an end to,—the transfer, from the king of this realm to the Pope of Rome, of any power whatsoever in the nomination and in the appointment of the bishops. And from the title of the statute itself, and from the very provision in the beginning and at the end of that statute, it is apparent, that such was the single and sole object in the view of the Legislature.

The statute itself, which is the 25 Hen. 8, c. 20, is entitled “An Act for the nonpayment of first-fruits to the Bishop of Rome”(z). Now your lordships are aware that before this statute, the Pope of Rome had claimed the nomination of bishops; and in Roman Catholic times, no bishop was, notwithstanding the statute of Edw. 3 (a), appointed without some reference, in some way or other, to the Pope of Rome; and whilst the appointment and nomination of the bishops was taken away from the Pope by act of parliament, he nevertheless interfered by virtue of his spiritual authority, by requiring the performance of various ceremonies, for which large sums of money were, from time to time, paid to the Pope; and it was one of the first acts of the Reformation, and one of the great objects of the Reformation, to put an end to that system; and that was all the Legislature had in view, in this act of parliament.

The act recites at great length the act of 23 Hen. 8 (b), which act of parliament was passed with a view, in fact, of some compromise with the court of Rome; under which, some degree of interference might be permitted, in which some opening was left, from which it might be expected that composition might be made—perhaps a pecuniary composition—and the claim of the Pope of Rome put an end to. The act recites: (c)—“And albeit the said Bishop of Rome, otherwise called the Pope, hath been informed and certified of the effectual contents of the said act, to the intent that by some gentle ways the said exactions might have been redressed and reformed, yet nevertheless the said Bishop of Rome hitherto hath made none answer of his mind therein to the king's highness, nor devised or required any reasonable ways to and with our said sovereign lord for the same. Wherefore his most Royal Majesty, of his most excellent goodness for the wealth and profit of this his realm and subjects of the same, hath not only put his most gracious and royal assent to the aforesaid act, but also hath ratified and confirmed the same, and every clause and article therein contained,” and so forth. And then there follows, in the 3rd section, a specific enactment, that no one shall be presented to the see of Rome, as Bishop or Archbishop, and no annates or first-fruits shall be paid. And in the 4th, there is the manner of electing the archbishop or bishop; and by that section it is enacted, that the king may issue his *Congé d'élire*, and the dean and chapter may choose

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(z) Vide *supra*, p. 52, n. (k).

(a) 25 Edw. 3, st. 6; “The Statute of Provisors.”

(b) *Supra*, p. 31, n. (s).

(c) For the whole of the statute, see p. 26, n. (r).

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the bishop; and if they fail to do so in twelve days, the king himself, by letters patent under the great seal, may appoint a fit and proper person. Then comes the 5th section, one part of which becomes extremely material. The 5th section is, "That whensoever any such presentment or nomination"—that is, the presentment or nomination made by the king in default of an election by the dean and chapter—when that shall be made, he is to certify to the archbishop, and the archbishop is to take certain steps accordingly. But then, if the dean and chapter have elected, the provision is: "And that the person so elected, after certification made of the same election, under the common and covent seal of the electors to the king's highness, his heirs or successors, shall be reputed and taken by the name of lord elected of the said dignity and office that he shall be elected unto; and then, making such oath and fealty only to the king's majesty, his heirs and successors, as shall be appointed for the same, the king's highness, by his letters patents under his great seal shall signify the said election, if it be to the dignity of a bishop, to the archbishop and metropolitan of the province where the see of the said bishoprick was void, if the see of the said archbishoprick be full and not void; and if it be void, then to any other archbishop within this realm, or in any other the king's dominions; requiring and commanding such archbishop, to whom any such signification shall be made, to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him"—now, it is not mere confirmation, nor mere consecration, but it is "to give and use to him all such benedictions, ceremonies, and other things requisite for the same, without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome for the same in any behalf." Now, nothing can be more obvious, than that there was no intention of making any alteration whatever, in the form or mode of proceeding, as to confirmation; but it merely was, that the king shall issue his mandate to the archbishop to proceed to confirmation, and to do everything else that should be necessary for that purpose, *without reference or application in any behalf to the Bishop of Rome.*

That was the whole provision: it was not a separate sentence, or separate enactment, that all this is to be done under the king's authority to the archbishop; but it was to be done without any reference or application to the see of Rome. And therefore, nothing, I apprehend, can be plainer, than that whatever the law requires with regard to the ceremony of confirmation,—whatever inquiry, whatever proof, whatever forms of proceeding, for the purpose of discussion and examination and afterwards of judgment, the law had previously required,—is in no wise dispensed with or set aside by this statute. All that remains the same. It only is that, under this act of parliament, when the sovereign shall issue his mandate for confirmation of a bishop, the bishop is to be confirmed without any communication with or reference to the see of Rome. And the last provision, which provides for the penalty, is to the same effect. That is in the 7th section. "Be it further enacted, by the authority aforesaid, that if the prior and convent of any monastery, or dean and chapter of any

cathedral church, where the see of any archbishop or bishop is within any of the king's dominions, after such licence as is afore rehearsed shall be delivered to them, proceed not to election, and signify the same according to the tenor of this act, within the space of twenty days next after such licence shall come to their hands; or else"—(there is the provision applicable to this particular case)—"or else if any archbishop or bishop within any of the king's dominions, after any such election, nomination, or presentation shall be signified unto them by the king's letters patents, shall refuse, and do not confirm, invest, and consecrate, with all due circumstance as is aforesaid, every such person," and so on; "then all persons so offending and doing contrary to this act, shall run in the dangers, pains, and penalties of the statute of the provision and *præmunire*, made in the 25th year of the reign of King Edward 3, and in the 16th year of King Richard 2."

Now, my lords, I apprehend, when I refer, as I will do in a few moments, to the authorities of all the most eminent text writers, all who have most diligently considered the canon law and the common law on this important subject, which will all be found unvarying and uniform as to what the nature, and ceremony, and proceeding of confirmation should be, I apprehend your lordships cannot entertain any doubt, but that this act of parliament, which was to exclude all jurisdiction and interference on the part of the Bishop of Rome, has nothing whatever to do with the judicial proceeding to confirm by the archbishop or his Vicar General; but that must take place, as it theretofore had taken place, according to the canon law, and according to the common law; and that if, in the course of that proceeding, the archbishop is required to enter upon an examination and proof, among other things, as to the fitness of the bishop elect to be confirmed a bishop, he must enter into that examination, according to the ordinary and usual forms of law; and there is nothing whatever, in this statute, which in the slightest degree interferes with that.

Now, my lords, I am at a loss to understand upon what precise grounds the case can be put, in contending that this statute alters the form of proceeding; and that, when we find confirmation is not a single act, but that in fact it is a judicial trial, that it is a trial, where there are various parties, proceeding upon pleadings, and on articles, and upon proof, and when we find that it pronounces also a judgment and sentence, and that the judgment and sentence are founded upon the proof that has been adduced, and upon the articles that are exhibited being substantiated by proof. I am at a loss to understand whence the argument is to be deduced, or where the argument is to be found on the statute, that any part of these proceedings is to be dispensed with; and, in adverting to the authorities on the subject, I must entreat your lordships to remember the importance of the question, now unfortunately raised for the first time, but a question that must be settled, as a question of such vital importance to the church and to the people of this country.

My lords, it is upon this judicial proceeding of confirmation, on the part of the archbishop, and it is upon this alone, that any inquiry or examination can take place, under the law of England, as to the fitness, in point of piety and doctrine, of the individual in

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question, to be one of the bishops of the Church of England. If a mistake be made; if the dean and chapter be misled; if the crown be deceived, or ignorant; if the minister of the crown be likewise deceived, or ignorant; and if one, however unfit, however grievously and fatally in error, in point of doctrine—and I may even put the extreme case of an infidel being returned as elected by the dean and chapter, and then submitted to this judicial proceeding towards confirmation, before his title and station as a bishop shall be perfect; if one or more who may know of this error, this vice in his qualification, be denied the right to come in; in other words, if no effectual examination can take place upon this proceeding; then none can take place at all: one who may not only err in point of doctrine, but one who may be absolutely an infidel and no Christian, may nevertheless be made a bishop, and placed in power in this country, and over his diocese, invested with its ecclesiastical, and in some respects its temporal, government. Although the clergy of the diocese may know this, and be able to prove it, they have no means of doing it, but must submit to be placed under his control. Your lordships will see the importance of the question, amongst others, to those individuals who had thought proper to come forward. I say nothing, I should not presume to offer an opinion, upon the points of doctrine upon which it has been supposed that this gentleman is not strictly orthodox, according to the true and pure doctrine of the Church of England. I say not one word upon that subject; but it is enough that clergymen of the Church of England—beneficed clergymen within this diocese—come forward, and undertake to prove that he is not of sound doctrine and teaching, and that he is therefore not duly qualified to be a bishop of the Church of England.

Now, my lords, what is the situation in which all within this diocese are placed, if no examination could be had, and they are denied a hearing? Why, in the first place, under the late act of parliament, and indeed without reference to the late act of parliament,—I mean the Church Discipline Act (*d*),—the moment confirmation finally takes place, the bishop becomes a judge, becomes an ecclesiastical judge; and he has the sole and exclusive power, upon many points of proceeding, and of governing, under the Church Discipline Act. But, my lords, consider further. I take the case of a deacon within the diocese; one not ordained a priest, but a deacon within the diocese. He may know of what in fact is an error in the doctrine and opinions of this bishop elect. He may be able to substantiate and prove it, if it be an error; and if the bishop elect, being in that error, remain under that error, if he be confirmed and become a bishop, he may, by reason of that very error, upon a secret examination, without assigning any reason (for he is accountable to no other tribunal), refuse to ordain as a priest this deacon, a pure minister perhaps of the Church of England; and there is no remedy. And the consequence of that confirmation is, to place all the deacons of this diocese, for the purpose of being ordained priests, within the jurisdiction, and subject to the sole decision, without appeal, and without reasons given, of the bishop of the diocese, as to

whether they are to remain deacons for life, or to be ordained priests, and to obtain that preferment in their profession, to which all men aspire. And if there be a deacon within that diocese, who knows that a person, about to be confirmed as a bishop, holds an opinion, I will suppose, with reference to the doctrine of the Trinity, holds the opinion that there are three Gods and not one God, holds that that is the true spirit of the Christian faith; in what position is he placed, if he be not permitted to come in, and allege and prove that as the ground why (if it be false doctrine) a person holding that doctrine shall not be made a bishop, and be denied the right of preventing that person being made a bishop, and preventing his acquiring power to carry that false doctrine in his bishoprick into effect? He is the person that, under a secret examination, a secret decision from which there is no appeal, and no accountability, may exclude him from any future step or advancement in the sacred profession to which he belongs. And when we find that, for century after century, no one bishop has been appointed or confirmed within this realm, without this proceeding to which I am now calling your lordships' attention; without the citation to all persons to come in and appear, if there be grounds of opposition; without several solemn warnings or proclamations to all, who have such grounds, to come in and oppose; and when we find that one, perhaps having the ground I am now suggesting, comes in to oppose, where he had been told, the moment before, he should be heard if he had good ground of opposition;—is the court to hold that these proceedings are worse than a useless form, that they are a mockery and a delusion; and that, upon the most sacred, most solemn, and most important subject in which mankind can be engaged?

Now, my lords, therefore, let us see whether there is any authority for saying, under this statute, or for any other reason to be found within the compass of the law of England, that, where these proceedings take place, persons shall not be heard, or there shall be no inquiry and examination and hearing, and that they are a mere form. I will proceed to call your lordships' attention to the various authorities, in which all these forms are pointed out as strictly necessary, and where it is laid down, that a failure to comply with any one of them, renders the subsequent proceedings void.

My lords, it is not merely by the ecclesiastical writers, that these forms are pointed out, and the means of proceeding ascertained. Your lordships will find it also in the case of *Evans v. Ascuithe*, in *Palmer's Reports*. I read from page 472. That was a case in which the question arose as to the right to certain temporalities, and in which it was necessary to consider the whole form of proceeding on the appointment of a bishop, and the periods at which certain rights were acquired by the bishop so appointed. In page 472, the court observed:—"A second thing was the steps and degrees in making of bishops, and what authority, and what power accrues to him by the election, confirmation, and consecration, and what not; and when thereby his former benefices become vacant . . . When a bishoprick is vacant, the course is, first, to have a *Congé d'élire*: secondly, letters missive . . . thirdly, then upon the election

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being made three instruments are dispatched, one to the party elected, the second to the archbishop, the third to the king, to certify it, and then there is the act of the assent of the person elected; this cannot be without his assent . . . Fourthly, then the king writes to the archbishop to consecrate and instal the person elected: Fifthly, then the archbishop puts forward a citation for all who will oppose the consecration, and appoints a certain day; and on that day if no one comes, all are pronounced contumacious, and the archbishop confirms him, and then he is consecrated." Then Doddridge enters rather more at large into it. He refers to a book which I shall have to bring under your lordships' attention upon this subject, by which it appears, that these are the steps which it is necessary to take, in order to make the confirmation of a bishop good.

My lords, the same case is reported in *Sir William Jones's Reports*, where, at page 160, he says: "Et donque le Roy per ses lettres patentes done son royal assent, et cominand l'Archevesque de luy confirme et consecrate, et a faire tout choses necessary, sur que l'Archevesq; examin le election, et ability del'person, et sur ceo il confirme le election, et apres luy consecrate." Now, my lords, this is not the account of a text-writer, but these are the various judges of England who, in dealing with this subject, declare what the duty of the archbishop is; that it is not merely to publish this citation, to call upon persons to come in and oppose, and only to confirm if no one come in and oppose; but that it is also to *do all things necessary*; and among those things is expressly mentioned the examining into the qualifications and fitness of the person. And your lordships will observe, that all this is long after the statute of Henry 8. And the case, which occurred in this court, treats of the duty of the archbishop, in this proceeding, as then defined and required by law.

Lancelottus.

Now, my lords, the book referred to by Doddridge, *Lancelotti Institutiones Juris Canonici*, is a work referred to with great commendation by more than one of the judges; and in the first book, page 38,—

Mr. Justice COLERIDGE. Does it appear who he was?

Sir Fitzroy Kelly. He appears to have been a native of Perugia, and a canonist of great eminence.

Mr. Justice COLERIDGE. Does it appear whether he was English or foreign?

Sir Fitzroy Kelly. Foreign. He is a foreign canonist. But his work, as I have just mentioned, is referred to, and referred to with much commendation, by Doddridge, in the case in *Palmer* to which I have called your lordship's attention. He says: "*Confirmatio non conceditur, nisi cum causæ cognitione*. Is autem ad quem confirmatio pertinet, diligenter examinare debet, et electionis processum, et personam electi. Est enim hoc generale, ut ad eum pertineat examinatio, ad quem manus impositio spectat. Et cum omnia rite concurrunt, tunc munus ei confirmationis impendat. Quod si secus factum fuerit, non solum dejectendus erit indigne promotus, verum etiam indigne promovens puniendus. Nihil est enim quod ecclesiæ

Dei magis officiat, quàm si indigni ad regimen assumantur animarum" (e).

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Then here is what is said with regard to the citation, in the same book, and under the same title. The heading of the 9th section is: "*In confirmatione faciendâ citandi sunt, quorum interesse potest.*" And the section says: "Illud etiam confirmantem observare oportet, ne, dum nimîâ in confirmando celeritate utitur contra doctrinam Apostoli, proprium affectum juri et æquitati præponat. Itaque, si co-electus aliquis, vel contradictor apparet, ante confirmationem nominatim vocandus est: alioqui si nemo apparet, in foribus ecclesiæ, in qua electio facta est, generaliter edicendum erit, ut si qui sint, qui confirmationi futuræ velint opponere, ad contradicendum in assignato peremptorio termino, præsentibus esse debeant. Quæ omnia locum habent, sive concorditer electio fuerit celebrata, sive non" (f). And then there is another observation: "*Opponentibus electioni, si deficient in probationibus, sunt puniendi.*"

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Mr. Justice COLERIDGE. Read those words again.

Sir Fitzroy Kelly. "*Opponentibus electioni, si deficient in probationibus, sunt puniendi.*"

Mr. Justice ERLE. Will you read the part again, beginning, "*Confirmatio non conceditur, nisi cum causæ cognitione;*" and then two quotations follow immediately. It is the early part of what you read,—"*Confirmatio non conceditur,*"—

Sir Fitzroy Kelly. I do not see it.

Lord DENMAN. Yes, you read it.

Sir Fitzroy Kelly. "*Confirmatio non conceditur, nisi cum causæ cognitione.*" And then, "*Is autem ad quem confirmatio pertinet, diligenter examinare debet et electionis processum, et personam electi.*"

Mr. Justice ERLE. That is the passage I allude to.

Sir Fitzroy Kelly. "*Est enim hoc generale, ut ad eum pertinet examinatio ad quem manûs impositio spectat. Et cum omnia rite concurrunt,*"—

Lord DENMAN. Will you be so good as to hand up the book.

Sir Fitzroy Kelly. I do not mean to trouble your lordships, by going further into the book; but the notes are very learned and very accurate, and will all tend to confirm the proposition for which I am now contending.

Now, my lords, I refer also to a chapter in *Ferraris*, who is also a foreign jurist; but a jurist of very great eminence, and also, like *Lancelot*, very frequently referred to by our old text-writers, and by some of the judges in the case to which I have referred. He says, in the chapter *de Confirmatione Electionis* (g),—

Ferraris.

Mr. Justice COLERIDGE. What work is this?

Sir Fitzroy Kelly. *Ferraris Bibliotheca Canonica*. My learned friend [Mr. *Badeley*] corrects me: it is in a case in the ecclesiastical courts that *Ferraris* is referred to, and not in the case in the common law courts. *Lancelottus*, in a passage already cited, says: "Itaque, si co-electus aliquis, vel contradictor apparet, ante confirmationem nominatim vocandus est." And *Ferraris* says, in his

(e) Lib. i., tit. 9, § 5.

(f) Ibid. § 9.

(g) Tom. ii., p. 457 (Venice, 1782.)

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work; "Si electus co-electum aut specialem suæ electionis adversarium habeat, is ante confirmationem nominatim vocandus erit;"—That is understood to mean, if any person has appeared and opposed before the dean and chapter, so that the bishop elect, or those who act for him, would know that a particular individual was an opponent, that individual must have received a particular notice—"is ante confirmationem nominatim vocandus erit; alias ubi concors fuit electio, aut nullus nominatim se electioni opponit, generale ac peremptorium edictum proponendum est in ecclesiâ in quâ electio facta est, ut si qui sint, qui se volunt opponere, constituto termino veniant. Confirmationes hiscæ"—I should observe, that it seems almost unnecessarily occupying time to contend, that these opposers must be heard. What is the meaning of this forming the subject of disquisitions of learned writers, pointing out minutely what is to be done in one case, and what is to be done in another; that when an opponent is known, he is to be called by name; when he is not known indeed, a general proclamation for opposers is sufficient? What can be the meaning of all this, if it is all idle useless form, and when the opponents come forward they are not to be heard? It seems, my lords, difficult to suppose, not only that all these forms are absurd, but that all that we find on the subject, in text-writers, is all so much useless idle matter, if the doctrine contended for be correct, that the parties, when called for and told they shall be heard, and who come forward upon this important subject, prepared with their allegations, are to be told, No, you shall not be heard; this is a mere form, and you are not entitled to be heard.

Lord DENMAN. Do they carry it any further than the statement you give of the actual practice of this country? I do not see that they do, because the person named is to be summoned, and, if no one is named, the citation is to be made general.

Mr. Justice ERLE. So far as the authorities have gone as yet, it is to examine into the form of the election, and the identity of the person. No passage you have yet cited has indicated, that any person might raise a question, and propound a veto, against the individual, for his qualification.

Sir Fitzroy Kelly. With submission, I will call your lordships' attention to the petition of the bishop elect, which shows various matters upon which—

Mr. Justice ERLE. I meant, the authorities from the canon law. You are proposing to pass them by, as if they all established that inference from *Lancelot*. I fancy it is not so. It does not appear so, as I follow it. In *Lancelot*, it is the "Electionis processum et personam electi."

Sir Fitzroy Kelly. I think your lordship will find it goes further than that.

Lord DENMAN. It is very important you should state that, if it be so.

Sir Fitzroy Kelly. If there is any passage, it would be very material.

Lord DENMAN. This may throw light upon the old law of the country.

Sir Fitzroy Kelly. Just so.

Lord DENMAN. It would be very important to show, with what sanction it is recommended, and with what mode of inquiry, and with what consequences.

Sir *Fitzroy Kelly*. I think, as to the mode of inquiry, the very circumstance of these proceedings taking place, as I have already shown they have in the present case, where there is the Vicar General, the judge of the archbishop, and where various parties appear by their proctors, where they give in their allegations through their proctors and signed by advocates, with all the forms of ecclesiastical law, and finally proceeding to sentence,—shows that they sit there as a court. Now all the processes of the ecclesiastical court, and the forms of proceeding of that court, are very well known to the law. It is not merely the confirmation of bishops, but there are other matters of great importance which take place and are decided in the court of the Vicar General; and therefore, I apprehend, it is enough for me, if I show there is a judicial proceeding in a court known to the law, where the proceedings are so carried on, with all the forms and observances usual in suits in that ecclesiastical court; and that, among the matters which have to be inquired into and determined, is that to which I am now calling your lordships' attention.

Mr. Justice COLERIDGE. At present, I do not understand that we know what the objection would have been. For all we know, it might be, that the gentleman produced was not *persona electi*, or that there was something wrong in the *processus electionis*. We cannot tell.

Sir *Fitzroy Kelly*. I apprehend the proposition of law to be contended for is this, that where the citation takes place, opposers may come in and oppose the confirmation of the bishop.

Lord DENMAN. Will you hand up those two books, *Ferraris* and *Palmer's Reports*.

Sir *Fitzroy Kelly*. There is one sentence more I have to read from them, and I will then hand them up to your lordship. My lords, I apprehend when we look at all these authorities, and the course of proceeding, the only question is this, what are the matters into which this ecclesiastical court is to inquire; what are the matters upon which the court has to determine, in order to the confirmation of the bishop elect? They are no more one than another. It is no more the validity of election by the dean and chapter, than it is the mandate of the queen to confirm: it is no more the mandate of the queen to confirm, than it is the fitness of the bishop elect in point of piety, learning, and birth. All these are matters, every one of them, to be examined into, discussed, and determined by that court; and upon any one, or all of them, opposers are cited to come forth. I need not trouble your lordships by reading over again the form of citation, nor the form of proclamation; both are general: they call upon persons to come in and oppose, what? the confirmation. Upon what ground? No particular grounds are specified: it must be therefore upon any of those grounds which, if established, would be a good ground of objection to the confirmation. Well then, to see what these are, we must see what it is that the court is to inquire and examine into and deter-

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ine upon, in order to a confirmation: and these, as I read to your lordships from *Burn*, and which appear in the petition which the bishop elect is bound to prove, consisted, I think, of nine articles. They are given particularly in *Burn*; and the very petition of this case, which is upon the affidavit (*g*), states those circumstances; and I shall by and by call your lordships' attention to *Gibson's Codex*, which likewise enumerates those nine articles. Now the first is, that the see was vacant, and had been vacant for some time. And the second, that the dean and chapter, having appointed a day, duly summoned all persons concerned. The third is, that they unanimously chose the person now to be confirmed. The fourth is, that the election was duly published. And then we go on, till we come to the sixth. And your lordships will see what the sixth article of the petition is. The sixth is, "that the person elected is sufficiently qualified by age, knowledge, learning, orders, sobriety, condition, fidelity to the king, and piety" (*h*). Now, that is one of the articles of the petition; as to which the bishop elect must produce proof; as to which the court must inquire; into which they must examine; upon which they must determine. And the invitation is general, to all persons, to come in and to oppose, on any of the grounds. One ground of opposition might be, that the dean and chapter had never elected; that he was not duly elected by the dean and chapter. That would be a good ground of opposition; so that he could not be confirmed, unless he proved, or if the other disproved, the election. So with regard to the queen's mandate: they could not confirm without the queen's mandate (the letters patent). They must be proved. Nor can the archbishop confirm, until he has examined into the sixth article of the petition, that the person elected is sufficiently qualified, among other things, by knowledge, learning, and piety. Here there is a general notice to persons opposing, to come in and appear, if they have grounds of opposition; and, among other things, they are to oppose, if they can, this particular allegation of the fitness of the party,—the qualification of the party, in point of knowledge, learning, and piety. In the particular case, upon the affidavit, it is upon that point that this opposition—

LORD DENMAN. The ground of opposition is expressly stated in the affidavit? Is it?

Sir *Fitzroy Kelly*. Yes certainly. I will call your lordships' attention to it. It is expressly stated that it is unsoundness of doctrine and teaching (*i*). And nothing, I apprehend, can be more clear, than that any individual, who is unsound in doctrine or teaching, is not qualified by learning and piety to be confirmed a bishop of the church, and I need hardly—[The judges consulted]—I need hardly remind your lordships here, that I am not even suggesting anything as to the truth of these allegations, which the parties opposing state, propound, and offer to prove. All that they ask is, that they should be inquired into; that the archbishop, or the vicar general, should examine into the question whether it is true, that an individual, about to be confirmed a bishop, is unsound in

(*g*) *Supra*, p. 89.

(*h*) 1 Burn, E. L. 206.

(*i*) *Supra*, p. 91.

doctrine and teaching; because, if he be, he has failed in one proof of his petition, and the confirmation cannot take place. That is one point; and the only question is, whether they are to be admitted to propound their articles, and to substantiate them in proof, and so to put that important question in course of inquiry, in this the only competent court to enter upon that inquiry. I was observing that all these, doctrine, learning, and piety, being among the several matters which have to be proved and examined into by the court, we find in the very last author I was referring to, *Ferraris*, that the inquiry has not been confined to any one particular ground, namely, the validity of the election by the dean and chapter, but embraces any other ground. There is one about to be confirmed a bishop; he undertakes to prove certain articles: amongst those, are the soundness of his doctrine and piety; and here is a general notice to all the world to come in and oppose him upon that point. "Si electus co-electum aut specialem suæ electionis adversarium habeat, is ante confirmationem nominatim vocandus erit; Alias ubi concors fuit electio, aut nullus nominatim se electioni opponit, generale ac peremptorium edictum proponendum est in ecclesiâ in quâ electio facta est, ut si qui sint, qui se volunt opponere, constituto termino veniant." And yet it is to be said, that they are not to come at all. It was to the last sentence that I wished particularly to call your lordships' attention before I handed the book up, "confirmationes hisce non observatis factæ ex eodem capite declarantur viribus omnino carere, irritæ et nullæ." So that, these things not being done, no one being admitted to oppose, the confirmation itself is declared "viribus omnino carere, irrita, et nulla."

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Ferraris.

Now the English canon law is exactly to the same effect. I refer, my lords, now to *Lyndwood*, who was an official of the court of Canterbury. *Lyndwood*, in his *Provinciale, De Jure Patronatûs*, page 218 (j), is speaking of the election and confirmation; and he says:—"Una conclusio est, quòd in negotio electionis, de qua hic loquitur, non sufficit sola citatio eorum quorum interest, sed opus est discussione negotii: alioquin non valet confirmatio. Ex qua conclusione apparet, quòd in negotio præsentationis, quod æquivalet negotio electionis, ut infrà dicetur, non sufficit vocationem fieri, sed cum hoc opus est discussione negotii. Alia conclusio est, quòd licet confirmatio electionis sine vocatione facta sit irrita et inanis, electio tamen tenet in suo robore et vigore, ita quòd iterum quæri debeat de viribus ipsius electionis. . . . Tertia conclusio est, quòd si plures sunt coelecti, vel plures oppositores, singuli sunt vocandi, si de eis constet." So your lordships see, what this learned writer says is this; that the election indeed is not void because there is no citation, or proclamation for opposers, at the confirmation; yet, it is clearly stated, the confirmation is void, for the expression is, "alia conclusio est quòd licet confirmatio electionis, sine vocatione facta, sit irrita et inanis." So the confirmation is "irrita et inanis;" and under that is the "vocatio," and also the "opus discussione negotii." There must be a discussion of the business; I presume that means an argument; an argument upon discussion before the court, a public

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discussion at the bar, and consideration by the court. And then "confirmatio electionis, sine vocatione facta, sit irrita et inanis;" yet that shall not avoid the election. Now in the same book, at the end, that is, in the constitution of *Othobon*, with the Gloss of *John de Athon* (an English canonist),—a work which is published as a sort of appendix to *Lyndwood*,—at p. 133, there is this gloss on the word *Confirmatio*:—"Quæ fieri non debet absque vocatione nominatim factâ, ubi specialis et certus est adversarius seu contradictor; immo nec alias absque generali proclamatione in ecclesiâ ubi fiebat electio." And then, in the same page and title, in the text, there is this:—"Quòd si in aliquo præmissorum is, ad quem confirmatio spectat, electum deficere suâ discussione compererit, eidem nullatenus munus confirmationis impendat" (*k*). That consideration is rather with reference to the qualification of the person.

Lord DENMAN. The last you cited was page 258?

Sir *Fitzroy Kelly*. 218 was the first, and the last was in the Appendix, page 133.

Ayliffe.

Now, my lords, I will trouble your lordships by reference to the two great English canonists, *Ayliffe*,—*Ayliffe's Parergon*, and *Gibson's Codex*, for the purpose of showing how indispensable this notice is, and, if it should not take place, the proceeding shall be void. I refer to *Ayliffe's Parergon*, p. 245. "In granting confirmation, all such persons ought to be first cited who have opposed the election; and these ought to be cited nominatim, if the election was made of a part of the electors: but if the election was made unanimously and concorditer, then all such persons ought to be cited in general, who may or will object any thing against such election, to appear at a certain day and place, when the confirmation is to be performed, in order to show cause of their disapproving of the election, and to impeach the confirmation thereof. And thus as an election gives a beginning to some church preferments, so does confirmation add a perfection thereunto."

Gibson.

So, by this English canonist, it is laid down, that the notice must be given generally for any thing there may be objected to in the election, in order to what? Not that they may come and be denied a hearing, but to show the cause of their disapproving of the election, and their opposition to the confirmation thereof. And your lordships will likewise find, on referring to *Gibson's Codex*, that the same principle prevails. The same doctrine is to be found in the first volume of *Gibson's Codex*, in a chapter which in truth contains the whole law and practice upon the subject of "the manner of electing, confirming and consecrating." It is in the 1st volume, page 110. In the first place, I need not weary your lordships, by reading over what I have already read from *Burn's Ecclesiastical Law*. But *Gibson* likewise points out the different stages of the proceeding; and among other various matters, which in order to confirmation must be propounded and proved by the bishop elect, he also gives the citation; and after giving the form of citation, to which I have already alluded, he proceeds: "According to the direction of the ancient canon law, where it makes all confirmations void

that are performed *nullis vocatis, et non discusso negotio*; and then adds, *vocationem autem hujusmodi nominatim, ubi est coelectus, vel apparet oppositor, alias generaliter in ecclesiâ in qua electio facta est, ut si qui sint, qui se velint opponere, compareant assignato peremptorio termino competenti, faciendam esse censemus. Quæ, etiamsi electio in concordia celebrata fuerit, volumus observari.*" Now nothing can be more clear or express than that, or than the conclusion here drawn, according to the direction of the ancient canon law, where it makes all confirmations void, that are performed "*nullis vocatis, et non discusso negotio.*"

I do not know that I need trouble your lordships with any further authority, to show that such is the law, and such has been actually the usage, in this country, in all times, undoubtedly ever since the first of Elizabeth, when this statute of Henry 8 was revived, and when the elections and confirmations of bishops began to take place, after the interval of Queen Mary's reign, exactly in the manner and form in which they are now conducted; that it is a necessary and essential part of these judicial proceedings towards confirmation, that those allegations on the part of the bishop elect should be given in, and should be proved; that among those allegations is that of competent piety and learning; that it is likewise an essential part of those proceedings, that notice should be given, by the citation before the day of trial, and by one or more proclamations on the day of trial, in some cases to the persons by name, but in all cases generally, to opposers to come in and make opposition, if they have ground of opposition, to the confirmation which is about to take place; that that notice is not limited to any particular ground of opposition, for the validity of the election, the identity of the person, and his age or legitimacy are collateral objects; but that it is general, and it invites persons to come in and oppose upon any ground which would, if substantiated, be a sufficient ground, in point of law, to prevent the confirmation. And when we find that, among the allegations of the bishop elect, he was bound to prove the allegation of qualification in point of piety, I apprehend it is perfectly manifest it is by far the most important matter of all that the bishop has to prove, of all that the court is to inquire into and determine, is he of sound doctrine according to the true doctrine of the church of England? Is he of sound doctrine and teaching? Because, if he be not, he is placed in spiritual authority without limit, and to some degree even, in temporal authority, over the people of this country, over the ministers of the church of England. Upon his fiat, without responsibility, and without appeal, depends whether any deacon in his diocese shall be ordained a priest; upon his fiat depends whether any beneficial clergyman, who passes to another diocese and takes a living, shall be accepted in that; and therefore, his soundness in point of doctrine, his freedom from error in things which render the deacon a proper person to become a priest, or a priest to go from one diocese to another, must be all-important.

It is upon these points that the objection is here made; and the question your lordships have now to determine is, whether, looking at these authorities, there is any thing in the statute of Henry 8, or any other statute or law, which authorizes, far less compels, but

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stat. of Hen. 8.

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proposed ob-
jections.

Articles regu-
lar in form.

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proper course
here.

which authorizes the court, under these circumstances, having made proclamation for the opposers of the confirmation of the bishop elect to come in and oppose and substantiate their opposition, having notified and declared to them (if any such there were) they should be heard,—which authorizes it, upon such opposers coming forward, and, with all the forms of law offering their allegations and proofs, in support of those allegations, to reject their allegations unheard.

I have already addressed all the observations which occur to me upon the subject; not only does the statute, as your lordships observe, expressly say, that the confirmation is to take place, but that it is to take place “with all due circumstances,” (I think the expression is): “To confirm the election, and to give and use to him all such benedictions, ceremonies, and other things.” I apprehend not only does the statute expressly require that every thing is to be done, which, in the course of confirmation, and to give validity to the confirmation, is right and usual, but even if the word *confirmation* stood alone, the meaning of it would be, that the confirmation was to take place, not by the simple act of confirmation, different to what confirmation had previously been, but it must be a confirmation with all the forms of law, according to what had been by law established.

My lords, I ought to state to your lordships here what appears upon the affidavit with regard to the objections which were about to be made. I would venture to take it for granted that your lordships cannot inquire into the validity of those objections, still less into the truth of those objections; but in order that your lordships may be made aware of the general nature of them, and that they are such as, if substantiated, would amount to a sufficient reason why the bishop should not be confirmed, I will merely state to your lordships what the affidavit alleges on that subject.

LORD DENMAN. I think you need not trouble yourself to enter into those particulars.

SIR FITZROY KELLY. I will content myself with saying, that it appears upon the affidavit that the objections affect the doctrine and teaching of the bishop elect; and there would be no doubt, if they were true, and if they were substantiated in due form, that they would furnish an abundant reason, why the archbishop should not, according to his conscience, and according to the principles of law touching the church of England, confirm this gentleman.

MR. JUSTICE COLERIDGE. Does the affidavit say they were prepared in due form of law?

SIR FITZROY KELLY. Yes: the affidavit of the opposer is in that form; that articles had been prepared in writing, and duly signed by an advocate, and a proxy had been delivered to the proctor, who was prepared to exhibit those articles, and to substantiate them in due form of law; and that that was stated to the judge, and led to the long argument which did take place upon the preliminary point, whether the parties were entitled in substance and by law to be heard at all.

I do not know whether it is necessary to trouble your lordships with any authorities, with regard to the writ of mandamus being a proper course upon this occasion. Supposing I am right and have

satisfied your lordships, upon the authorities I have cited, that this is a judicial proceeding, where not only the matters appearing upon the affidavit, but the sentence, to which I have not yet called your lordships' attention, but which I will read over in a very few moments, very clearly shows that it was the duty of the court to conduct that proceeding according to the forms of law; and among the forms of law they were bound to give notice to opposers to come in and oppose; and if persons come in and propound their opposition, according to the practice of the court, they were bound to hear them; and, in failure in any one of these matters so required, the subsequent proceeding is altogether null and void;—supposing that to be so, I apprehend the clear and plain remedy is, by a writ of mandamus, issuing to the inferior court in question, commanding them to hear these objections, according to the course and practice of that court.

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My lords, before I trouble you with one or two authorities on that point, I would call your lordships' attention to the form of decree which, independently of all those authorities, leaves no manner of doubt as to what is the nature of these proceedings. The decree of the Vicar General is this:—[The learned counsel read the definitive sentence from the affidavit, *supra*, p. 90].

Form of the definitive sentence.

My lords, if these subsequent proceedings, when the court has refused to hear parties appearing lawfully before them, are, by reason of that defect, void, the case I apprehend, in point of law, stands thus. Here is an inferior court, with a case before it; and that case is at this moment undetermined. Certain parties are before that court: some of those parties have been heard, others of those parties have claimed to be heard and have been refused. This, therefore, is the most uncommon case, of an inferior court, with a case before it, certain parties claiming to be heard, and the court refusing to hear them; and then the only and the proper remedy is, a mandamus from this court, commanding them to proceed with their case, and to hear those parties. It is exactly the same as if it were a court of quarter sessions, or magistrates who are made a court for particular circumstances under an act of parliament; who are bound to summon certain parties before them, and, when they come before them, and the case is before them, refuse to hear those parties; and so the case is, in point of law, undetermined. It is rather, in point of law, here, that the court refused to allow them to be made parties,—that it refused to allow them to appear; and therefore, I apprehend, in point of law, these subsequent proceedings being, under the authorities to which I have called your lordships' attention, altogether void, the case stands exactly as if a court of quarter sessions, or any other inferior court, having a matter before it, certain parties appear before it and are heard; other parties appear and are not heard; it refuses to admit those parties as parties, and refuses to hear them; and they come to this court for a mandamus, to compel the inferior court to hear them upon the case, and then to determine the question.

Parallel to court of quarter sessions refusing to hear parties summoned.

My lords, the doctrine which I apprehend will govern this case, is perhaps best stated in the case of *The King v. The Justices of Kent*, 14 East, 395. The marginal note is, "The stat. 16 Car. 1, c. 4, s. 2,

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having continued the stat. 1 Jac. 1, c. 6, the 2nd and 3rd sections of which last mentioned statute, in extension of the stat. 5 Eliz. c. 4, authorizes the justices in sessions (with the sheriff, if he conveniently may), to rate the wages of *any labourers, &c. or workmen whatsoever, &c.*; this court granted a mandamus to the justices, &c., of Kent to hear an application of the journeyen millers of that county, praying them to make such a rate; which application the justices had refused to hear upon the merits; considering that they had no jurisdiction over other than the wages of servants in husbandry." My lords, upon that a mandamus was issued, to compel them to hear this case, and to proceed with it; and Lord Ellenborough, after the argument, said:—"If the justices had rejected the application in the exercise of the discretion vested in them by the legislature, this court would not interfere; but if they had rejected it on the grounds now stated, that they had no power to grant it, the court would interfere so far as to set the jurisdiction of the magistrates in motion, by directing them to hear and determine upon the application. The court therefore granted a rule to show cause." And when cause had been shown, Lord Ellenborough held there was no ground for the doubt, and made the rule absolute, observing, "We do not, however, by granting this mandamus, at all interfere with the exercise of that discretion which the legislature meant to confide to the justices of the peace in sessions: we only say that they have a discretion to exercise; and therefore they must hear the application: but, having heard it, it rests entirely with them to act or not upon it as they think fit." The other judges concurred.

Now if, therefore, the court in this case had, as I submit to your lordships they had, clear authority and were bound to hear these parties, it of course would be for the court, having heard them, to determine the case as to it might seem right: but, having called these parties, and having refused to hear them, the parties are in precisely the same position as other parties before an inferior tribunal, when that tribunal has refused to hear them; and that I apprehend is what the court in this case is bound to do. The refusal of the court was to admit the opposers to become parties, to allow the proctor to appear under proxy, and to admit the parties to appear. The application we make, my lords, is for a mandamus to receive those proxies, to admit those parties, and to hear them and to determine as they (the court) think proper.

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Gort.

Rex v. Justices
of Middlesex.

Prohibition.

The same doctrine, laid down in the case I have referred to, is also to be found in an Irish case, *The Queen v. The Magistrates of Gort*, 1 *Jebb & Symes*, 388; and it was likewise laid down by Lord *Tenterden* in the case of *The King v. The Justices of Middlesex*, 4 *B. & A.* 300.

Now, my lords, as upon another set of affidavits, containing the same facts, and with the addition only of one or two others, not material with regard to the mandamus, I am also instructed to move your lordships for a prohibition against this court from proceeding further upon this sentence.

LORD DENMAN. You cannot have both at once.

Sir *Fitzroy Kelly*. I was about to say, as I am also instructed as to that, I shall not mix up with my observations anything connected

with it. There is, however, one authority, though it may seem to belong more to the case of prohibition than the case of mandamus, I will trouble your lordships by referring to, as showing the precise position in which, in point of law, I apprehend this cause in the inferior court stands. I mean the case of *Gould v. Gapper*, 5 East, 345. There, my lords, the court held, that where an inferior court proceeded in a case over which it had jurisdiction, but upon a misconstruction of an act of parliament, the court would prohibit—would interfere, by way of prohibition, to prohibit—the further proceeding upon that misconstruction. The case as your lordships very probably remember, was this: there was a claim for tithes, and a plea that the lands were in King's Sedgemore, a tract of waste land, and that under an act of parliament they became extra-parochial; the personal answer put in denied they were extra-parochial, insisted upon their liability to tithe, and so raised the question of the construction of this act of parliament, upon which it depended whether the land was extra-parochial or not. The court misconstrued the terms of the statute: upon that, a prohibition was moved for, and, after argument, this court held that the prohibition must go, and Lord *Ellenborough* makes this observation:—"The last question, therefore, which is certainly a considerable one, alone remains to be discussed. If this were a question which came now for the first time to be considered, we might incline perhaps to think it should be deemed matter of *appeal* rather than of *prohibition*, according to the opinion of Mr. J. *Buller* in *Home v. Lord Camden*, 4 T. R. 397, where he says, "if the court below have jurisdiction over the subject, though they mistake in their judgment, it is no ground for prohibition, but only matter of appeal." But considering the current of authorities from the earliest times down to the period when that case came before the court (the authority of which, as to that point, received, it will be recollected, no confirmation in the House of Lords; the point itself not being necessary to be decided in order to the determination of the case then in judgment); and remembering also, that in that very case, as also in *Brymer and Atkins*, Lord *Loughborough* and the other judges of the Court of C. B. clearly considered the misconstruction of an act of parliament as ground of prohibition: advert, I say, to these authorities and circumstances, we cannot feel ourselves warranted in holding that the grounds of granting prohibitions are so narrow and limited as to be confined solely to cases of excess of jurisdiction." His lordship then goes on, in a very elaborate judgment, to lay down the grounds upon which, although the court had jurisdiction over the subject-matter, yet, where they had proceeded upon a misconstruction of the act of parliament, a prohibition ought to be issued by this court. I refer to that case, not for the purpose of mixing up the two questions of prohibition and mandamus, which I wish to keep distinct, but for the purpose of showing, by the authority of that case, that if an inferior court proceed upon the misconstruction of an act of parliament, their proceeding from that time forth, although they have jurisdiction over the case before them, is unauthorized and void in law. And, my lords, if that proposition be established by the authority of this last case, as well as by the other authorities to which I have called your lordships'

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attention, then it brings the case in this inferior court precisely to the condition in which, I have submitted, it now appears before your lordships; viz., that here is a court, having jurisdiction, indeed, over the case which was before it, being bound to proceed with that case, but being bound to proceed with that case according to law; and the law requiring that that case should be proceeded with, certain parties ought of right to be before that court; some of those parties are before the court: others are not; they have appeared; they have claimed to be admitted to be heard, and so to be made parties, and to proceed in the case before the court. And here, from the misconstruction of an act of parliament, and from the course taken by this inferior court, is the dividing line: here they stop in the administration of justice; they refuse to hear these parties, who come before them; they refuse to admit them in the character of parties. Therefore these parties now come to your lordships, claiming by a writ of mandamus to compel the court in question to admit them as parties, and to hear them, and to proceed upon the determination of the points.

I submit to your lordships, therefore, without dwelling further upon the very great importance of the questions, that, upon all these things, there is a case made out, in which the parties complaining are entitled to the indulgence they claim, to press the opposition they feel it their duty to make;—a *bonâ fide* opposition; and an opposition which, if founded upon grounds which exist in fact and can be truly substantiated in proof, are grounds which ought to prevent by law the confirmation of the bishop elect. Having therefore laid these facts upon the affidavit before your lordships, and submitted these authorities to your lordships for consideration, I have only to say, that I hope your lordships will feel—as I assume your lordships will consider this case without reference to parties or even to consequences—that this is a case of the most grave and important character, and that your lordships will consider it fit for the deliberate judgment of this court.

I submit to your lordships, I am entitled, therefore, to a rule to show cause why a mandamus should not issue to this court, commanding them to admit and hear the parties opposing.

Lord DENMAN. (After a short consultation with the other judges):—Take a rule, Sir Fitzroy.

Rule nisi
granted.

HILARY TERM, 11 VICT.

On Monday, January 24, cause was shown against granting the rule for the mandamus.

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Coram—Lord DENMAN, Chief Justice; and PATTESON, COLERIDGE, and ERLE, Justices (*k*).

24th Jan. 1848.

Counsel for the Archbishop of Canterbury.

SIR J. JERVIS, Attorney General.

SIR D. DUNDAS, Solicitor General.

MR. M. D. HILL.

DR. BAYFORD.

DR. TWISS.

MR. WADDINGTON.

Counsel for the Opposers.

SIR FITZROY KELLY.

DR. ADDAMS.

MR. A. J. STEPHENS.

MR. PEACOCK.

MR. BADELEY.

Lord DENMAN. Mr. Attorney General.

The *Attorney General*. If your lordship pleases, I am to show cause against a rule which has been obtained by my learned friend, Sir *Fitzroy Kelly*, which calls upon his Grace the Archbishop of Canterbury and his Vicar General, to show cause why a writ of mandamus should not issue, directed to them, commanding them, or one of them, at a court to be therefor duly holden, in the cause, or business, or matter of the confirmation of the election of the Rev. Renn Dickson Hampden, D.D., to the Bishoprick of Hereford, to permit, and admit to appear, in due form of law, certain persons to oppose the confirmation of the said election. My lords, before I proceed to show cause in this case, I will state to your lordships, that it has been the desire of my learned friend Sir *Fitzroy Kelly* and of myself, with your lordships' permission, that we should be assisted by certain of our learned friends from Doctors' Commons, if your lordships will be pleased to hear them with us, upon this discussion.

The Attorney General's argument.

(The court consulted).

I am told the usual course has been to make a formal motion for this purpose.

Lord DENMAN. We shall be most happy to hear them—one on each side.

The *Attorney General*. I should state to your lordships that I

(*k*) Mr. Justice Wightman was sitting in the Bail Court.

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appear here, with my learned friends, upon this occasion, instructed by the government to show cause, but with the full concurrence of his Grace the Archbishop of Canterbury, in the course which we are now taking.

My lords, there are so many objections, which present themselves to the granting of this rule, that it is difficult to know, in what order to present them to your lordships; but possibly it may be convenient to take the course, which was pursued by my learned friend Sir *Fitzroy Kelly*; and tracing this question from its origin, after referring to the statute upon which the question mainly arises, to present to the court the various other objections, which must occur to your lordships' minds, against your entertaining this question.

My lords, it is unnecessary, I believe, for me to do more than shortly to call your lordships' attention to the course of the proceedings in this case, without at present (I shall have occasion to do so in the course of my observations) drawing your lordships' attention particularly to each step in the case.

Statements in
the affidavit.

The affidavit (*l*), on which the rule has been obtained, (and upon that alone I appear now, to show cause,) states, that there being a vacancy in the See of Hereford, a *Congé d'élire* issued, with a letter missive, pointing out as a fit person to be elected for his piety, wisdom, and learning, (the form of the letters missive being found in *Gibson's Codex* (*m*)), the Rev. Dr. Hampden, whose confirmation to that see is the subject of this discussion; that that election took place, and that it was duly certified to the crown and the archbishop, under the chapter seal of Hereford; and thereupon her Majesty, in the terms of the statute, issued her letters patent, accepting of the said election, and requiring and commanding the Archbishop of Canterbury to confirm the said election, and to invest and consecrate the person of Dr. Hampden. It then states the commission (*n*) directed to the Vicar General, and to Dr. Lushington and Sir John Dodson as commissioners assisting the Vicar General, with the various proceedings and matters of form, upon which my learned friend founds his objection; ultimately concluding with a definitive sentence of confirmation, which is set out. Then it states, what must not be lost sight of in the course of this discussion, that the objectors appeared, not for the purpose of impeaching the process of election, not for the purpose of raising any objection *in personam* to Dr. Hampden, but for the express purpose, as stated on the face of the affidavit, of opposing his confirmation, their opposition being founded "upon two books, written, printed and published by him: the avowed purport or object of the first of the said two books being to illustrate the injurious effects of dogmatism in theology; and in both books, in illustration of the (supposed) effect of dogmatism in theology, it is well known, or justly suspected, that, whether so by him intended or not, he hath, in fact, spoken or declared in the manifest derogation or depraving of many things in the Book of Common Prayer." Therefore, in truth, the objection is founded upon doctrine, not on

(*l*) *Supra*, p. 84.

(*m*) 2 *Gibbs. Cod.* 1327.

(*n*) This was a mistake: the affi-

davit did not state the commission.
See p. 21, n. (*p*).

any objection to the election itself; nor on any personal objection to Dr. Hampden; but upon two works, published a long time ago; one of which, they state, was condemned in convocation at Oxford. On those, and those only, they found their objections, which they urge upon this occasion.

Now, my lords, the first point I shall insist before your lordships is: that these matters of form, upon which my learned friend Sir *Fitzroy Kelly*, founds his argument, contending that they cannot be mere matters of form, by requiring opposers to appear, but must be matter of substance, are, by the terms of the statute, mere matters of form; and that the archbishop in the capacity of confirmer acts merely ministerially.

My second objection will be, (because it will be convenient to point out now the course I propose to adopt in presenting this case before the court),—my second objection will be, assuming the archbishop is not, as I contend, a mere ministerial officer by reason of the statute upon this occasion, yet, if that be not so, if he be a judicial officer, that, then, in a matter of this sort, the remedy, if he be mistaken, is by appeal, and not by mandamus; he acting within the scope, and not exceeding the scope, of his jurisdiction, (if he did so the remedy would be by prohibition); and that this is an attempt to substitute a mandamus for an appeal, which will not lie from this court.

Thirdly, I shall contend that, even if it be not a court, properly so speaking, but being a quasi judicial inquiry, that court possesses no means of investigating the subject-matter of this peculiar charge; and that if the matter be the subject of an inquiry, it should have been instituted and proceeded with under the church discipline act (o), which gives a form for such proceeding, and that this court has no right—I am now speaking of the court of the Archbishop of Canterbury, if it be a quasi court—no right to try this inquiry, any more than it has any charge of a mere temporal offence.

And fourthly, (which will present, as it must occur to your lordships' mind, the variety of branches of objection,) that this is not a case, under any circumstances, in which a mandamus will lie.

I need not now specifically point out,—I shall do so when I come to them, in the course of my argument,—the different grounds upon which I found these objections.

In order properly to understand the first objection, which in truth depends upon the true construction of the statute of Henry 8, it will be convenient shortly to refer to what was the process of canonical elections, before the passing of that act. And although that question, of course, opens a wide field for discussion, as to what may or may not be, properly speaking, books of authority upon the canon law, admissible in this or in other courts; and although I fear, in the mere statement of that, I am presenting at once an objection which must occur to your lordships, with respect to the entertainment of an inquiry of this description, because we are now about to deal with what in this court is foreign law, upon which your lordships have no positive knowledge, except by reference to

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books, as to which, your lordships know not even the authority of the books themselves;—it will be enough to glance at certain authorities, which may be used historically, for the purpose of explaining what was the nature of canonical election, before the passing of this act of parliament.

My lords, I find this matter sufficiently explained in a book, to which my learned friend referred, but in a passage which he did not notice, in his motion, in the first instance. In *Ayliffe's Parergon*, p. 126, we read; "When cities were first converted to Christianity, the bishops were elected *per clerum et populum*; for it was then thought convenient, that the laity as well as the clergy, should be considered in the election of their bishops; and that both laity and clergy should concur in the nomination of them: because he who was to have the inspection of them all, might come in by a general consent. But, as the number of Christians afterwards very much increased, this was found to be very inconvenient; for tumults were raised, and sometimes murders committed at such popular elections; and particularly, at one time no less than three hundred persons were killed at such an election. To prevent the like disorders, the emperors, being then Christians, reserved the election of bishops to themselves; but in some measure conformable to the old way, that is to say, upon a bishop's death, the chapter sent a ring and pastoral staff to the emperor, which he delivered to the person whom he appointed to be bishop of the place. And though the Pope, or bishop of Rome, who, in process of time, got to be the head of the church, was well enough pleased to see the clergy grow rich; yet he was not satisfied, that they should have any dependence on princes: and, therefore, he pretended, that they took money for their nomination of bishops, or (at least) charged their revenues with pensions; and thereupon, the canons in cathedral churches came to have choice of their bishops, which, by an encroachment of the papacy, were usually confirmed at Rome. But princes had still some power in these elections; for we read in the Saxon times, that all ecclesiastical dignities were conferred in parliament. And this appears by Ingulphus, Abbot of Crowland, in the reign of William the Conqueror, who tells that *a multis annis retro-actis nulla erat canonica prælatorum electio*; because they were donative by the delivery of the ring and pastoral staff as aforesaid: the one signifying that the bishop was wedded to the church; and the other was an ensign of honour always carried before him, and was a token of that support which they ought to contribute to the government, or rather that he was now become a shepherd of Christ's flock. Hildebrand, who was pope in the reign of the Conqueror, was the first that opposed this way of making bishops here; and for that purpose he called a council of 110 bishops, and excommunicated the emperor Henry 4, and all prelates that received investiture at his hands, or by any layman, *per traditionem annuli et baculi*. But notwithstanding that excommunication, Lanfrank was made Archbishop of Canterbury at the same time, and by the same means, according to Malmsbury; but the Saxon Annals in Bennet College Library are, that he was chosen by the senior monks of that church, together with the laity and clergy of England, in the king's great council.

Howbeit, Anselm did not scruple to accept the bishoprick by the delivery of the ring and pastoral staff at the hands of William Rufus, though never chosen by the monks of Canterbury: and this was the man, who afterwards contested this matter with Henry I. in a most extraordinary manner. For that king being forbidden by the Pope to dispose of bishopricks as his predecessors had, by the delivery of the ring and staff, and he not regarding that prohibition, but insisting on his prerogative, the archbishop refused to consecrate those bishops whom the king had appointed: at which he was so much incensed, that he commanded the archbishop to obey the ancient customs of the kings his predecessors, under pain of being banished the kingdom. This contest grew so high, that the Pope sent two bishops to acquaint the king, that he would connive at this matter as long as he acted the part of a good prince in other offices. Whereupon the king commanded the archbishop to do homage, and to consecrate those bishops whom he had made: but this being only a feigned message, to keep fair with the king, and the archbishop having received a private letter to the contrary, the archbishop still disobeyed the king. And at length, after several heats, the king yielded up the point, reserving only the ceremony of homage from the bishops, in respect of the temporalities, to himself: whereunto Anselm consented; provided it was done before consecration. And then the archbishop consecrated those bishops whom the king had appointed; and promised that no person elected to be a prelate should be refused consecration, because of the homage he had done to the king."

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And then a passage proceeds to state, as your lordships know, that, in the result of that controversy between the Pope and the Crown, King John granted a charter that bishops should be elected by canonical election; reserving to himself the power of veto, and the power of receiving the profits during the vacancy of the see. "Now to add more solemnity to this matter, and that canonical elections might not seem usurpations on the king's prerogatives, in appointing whom he pleased to vacant sees, King John, by his charter *de communi Baronum consensu*, granted that bishops should be canonically elected, provided leave was first asked of him, and his assent required after such election, and that he might have the temporalities during any vacancy (*p*). So they were then chosen

(*p*) The Charter of King John, for freedom of elections (A. D. 1214), is not printed in the common editions of the Statutes, but it will be found in the "Statutes of the Realm," published by the Commissioners of Public Records, vol. 1, p. 5. See also Wilkins's Concilia, vol. 1, p. 545. The following is the substantive part of it:—

"Johannes &c. . . . concessimus et constituimus, et hac præsentî cartâ nostrâ confirmavimus, ut de cætero, in universis et singulis ecclesiis, et monasteriis, cathedralibus, et conventualibus, totius regni nostri Angliæ, liberæ sint

in perpetuum electiones quorumcunque prælatorum majorum et minorum; salvâ nobis et hæredibus nostris custodiâ ecclesiarum et monasteriorum vacantium quæ ad nos pertinent. Promittimus etiam, quòd nec impediemus, nec impediri permittimus per nostros, nec procurabimus, quin in singulis et universis ecclesiis et monasteriis memoratis, postquam vacaverint, prælaturæ quemcunque voluerint liberè sibi præficient electores pastorem. Petiti tamen priùs a nobis et hæredibus nostris licentiâ elegindi, quam non denegabimus, nec differemus. Et si fortè

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by the dean and chapter, or by priors and convents; but yet the king retained this ancient prerogative of recommending the person to them: and that he might influence the election, he usually sent for the dean and chapter, or some of their number, commissioned by the rest, who met in his royal chapel, or in some church near it; and these chose the person he had recommended."

It appears, therefore, my lords, from that general statement, that the bishops having originally been elected by the people and the clergy; their election having afterwards been limited to the clergy, by reason of the increase of electors; and having then been taken by the crown; a conflict arose between the Crown and the Pope; the Pope desiring, and in fact insisting upon the right of confirmation, and in that confirmation being, I presume, according to the doctrine of their church, infallible. Ultimately it was compromised by the charter of King John, granting that bishops should be canonically elected, he reserving to himself the power of appointing or nominating the person to be elected, and influencing at that time, by his presence, the election that was to take place. Your lordships will find the same matter shortly stated in the *First Institute*, chap. 11, fol. 134 a, "*Episcopus*, a bishop, is regularly the king's immediate officer to the king's court of justice in causes ecclesiastical, and all the bishopricks in England are of the king's foundation, and the king is patron of them all; and at the first they were donative, and so it appears by our books, and by acts of parliament, and by history, and that was *per traditionem annuli et pastoralis baculi*, i. e. the crosier. And King Henry the First, being persuaded by the Bishop of Rome to make them elective by their chapter or convent, refused it. But King John by his charter acknowledging the custom and right of the crown in former times, yet granted *de communi consensu baronum*, that they should be eligible, which after was confirmed by divers acts of parliament. And afterward the manner and order, as well of election of archbishops and bishops, as of the confirmation of the election and consecration, is enacted and expressed in the statute of 25 Hen. 8." He therefore, in that work, refers shortly to what I have stated at length—I fear at too great length—from *Ayliffe*; showing that the election, originally being in the people, had become vested in the crown, and subsequently the difference was compromised; there was an opponent canonical election, and subject to confirmation by the Pope.

Canonical
election.

It is important therefore to consider, as to this question, what is canonical election. Because I think, if I can succeed in making the court understand what was required before the passing of the act of parliament, I can show the court, by the statute of Hen. 8, there has been a studious attempt to preclude all inquiry into what was formerly inquired into. For that purpose, I will refer your lordships to a work, cited by my learned friend Sir *Fitzroy Kelly*, as

Lancelottus.

(quod absit) denegaremus vel differemus, procedant nihilominus electores ad electionem canonicam faciendam; et similiter post celebratam electionem noster requiratur assensus, quem simi-

liter non denegabimus, nisi aliquid rationabile proposuerimus et legitime probaverimus, propter quod non debeamus consentire."

an authority, because it was mentioned with approbation by *Doddridge*, in the case of *Evans v. Askwith* (q), I mean *Lancelot*, which in truth is no authority, which never received the sanction of the Pope to make it authority, but which has been referred to by my learned friend, and may be usefully referred to, because all these works (and this is important) from the earliest period down to the most recent period, follow the same precise language; and it is now sufficient for me to state, that every thing that is now said to be required, is taken *verbatim* from what was the law before the passing of the act, and that there has been no new consideration of the subject since the passing of that act of parliament. *Lancelot* points out, in page 70 of the 1st book, title 7, the various steps of canonical election. I will not trouble your lordships with the unimportant parts, except stating them generally. You will find a long list of those qualified to elect and to be elected, a long treatise of qualification; and that is most important, because when you come to the question of confirmation, the bishop confirming is, by the canon law, to examine *processum electionis*. He is therefore to look at the qualification of the elected. I find various disqualifications applying to the electors, and various disqualifications applying to the persons to be elected: if they are within age; if they are not canonically qualified in other matters; and, amongst other things, if they have been busy in soliciting the appointment: and therefore, if the present bishop elect has asked to be made bishop canonically, that would be an objection. That having been so, and there being considerable discussion as to the persons qualified to elect and to be elected, then comes the next question, the confirmation. And, in title 9, various things are stated. This is the passage read by my learned friend: "Is autem ad quem confirmatio pertinet, diligenter examinare debet et electionis processum, et personam electi. Est enim hoc generale, ut ad eum pertinet examinatio, ad quem manûs impositio spectat" (r). Now upon that, your lordships will see that it is for him who is to confirm, to examine the *personam*. That will be found to be a most important observation. Why? Because when you come to the necessity for confirmation, you may find there may have been, in the old mode of canonical election, a *co-electus*. There may have been an equality of votes. There may have been persons disqualified among the electors, who may have cast the majority in favour of one party or the other, which was to be set right on confirmation; for, in truth, confirmation and election are but one thing, under the canon law: the election is not perfect until confirmation. The party superintending is, therefore, as the only mode of trying whether the election is perfect, to examine into the *processum electionis*, to see whether the majority is a good one. He is likewise to examine into *personam electi*. I will not stop now to inquire the proper meaning of *personam electi*: I will consider that presently, and if it means more than the actual identity of the party. It is sufficient for me to point out what was required by the old canonical law. Now, for the purpose of examining as well the process of

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(q) *Supra*, p. 108.

(r) Lib. 1, tit. 9, § 5, *supra*, p. 108.

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election (that is, the form of election), as the *personam*, or whatever it may be, of the elect, the work, in another portion of that title, proceeds: "Illud etiam confirmantem observare oportet, ne dum nimia in confirmando celeritate utitur, contra doctrinam Apostoli, proprium affectum juri et æquitati præponat." That is the passage cited by my learned friend. "Itaque si co-electus aliquis:"—therefore, that is, if there be a party who has an equality of votes with the man who comes to be confirmed—"vel contradictor apparet,"—that is, where a person objected to the personal qualification of the elect, at the time of the election, not at the confirmation—and that raises a most important question; because at the time of election, under the canonical law, if a man were under age, if he had solicited the appointment, if he had been twice married, or if there existed any other of the various objections which might be urged, those things being canonical objections to the elected—if any person was *contradictor* to the election, and that contradiction had been overruled at the time of the election, he had his further appeal at the time of confirmation, and was cited to appear at the confirmation. If, therefore, there was any person *co-electus* or *contradictor*, "ante confirmationem nominatim vocandus est"—(they must be summoned by name): "alioqui si nemo apparet, in foribus ecclesiæ, in qua electio facta est, generaliter edicendum erit, ut si qui sint, qui confirmationi futuræ velint opponere, ad contradicendum in assignato peremptorio termino, præsentibus esse debeant." Why then, if everything happens right, the election is good.

The rule therefore required this: if there were a *co-electus*, if there were an *objector* at the time, they were to be cited by name: if there were not, all those persons were to be cited generally, that they might appear. But there is a passage in an intervening chapter, which I should mention to your lordships. I have pointed out to your lordships that the chapter, title 7, spoke of the qualifications of the elect, and of the electors. But there was a mode of getting rid of all that; because a person not qualified might, notwithstanding, be made a bishop; and that was done by a postulation to the Pope. In title 8 (*s*), the writer shows, that every one of those qualifications

Postulation.

(*s*) Title 8, *De Postulatione*, is as follows:—

"*Quid sit postulatio?*

"Postulatio est ejus, qui eligi non potest, in prælatum concors capituli facta petitio.

"*Qui non animi vel corporis vitio, sed alias non potest eligi, potest postulari.*

"§ 1. Sciendum est enim quosdam esse, qui quamvis eligi non possint, postulari tamen minimè prohibentur. Quæ res ita videtur posse commodè definiri, ut quicumque non animi vel corporis vitio, sed ob alterius defectum qualitatibus impediuntur, iidem tamen postulari possint.

"*Minor 30. ann. et spurius possunt postulari.*

"§ 2. Ex hoc apparet, eum, qui

trigesimum annum nondum complevit, item in minoribus ordinibus constitutum, aut laicum, item natalibus læsum, licet eligi non possunt, postulari tamen posse.

"*Episcopus et electus debent postulari, non eligi.*

"§ 3. Episcopus quoque, cum propriæ sit alligatus ecclesiæ, ad aliam transitum facere non potest: ea propter, non eligendus, sed postulandus erit.

"*Abbatès et alii inferiores in episcopos possunt eligi.*

"§ 4. Non idem juris est in abbatibus, et cæteris prælatis infra episcopalem dignitatem constitutis. Isti enim licet propriæ ecclesiæ videantur alligati, nihilominus eligi possunt: proprium tamen non deserant monasterium, nisi licentiâ legitimè impetratâ."

in the elect, might be dispensed with, by a *postulation*, or a solicitation made by the crown to the pope, who issued his bull. The statute of 23 Hen. 8 (*t*) afterwards points out, how those bulls were obtained, dispensing with the personal qualification, and qualifying the person notwithstanding the deficiencies. It is important to consider that after the confirmation being thus made, follows the chapter on consecration, *De Consecratione*, and, throughout the whole of that chapter, it is important to observe that there, and upon that occasion, no ground or opportunity whatever is offered for any objector to object to the election, or to the personal qualification of the person elected. Then, in order to show, as is manifest from the author, and the country of the author, and the subject he is mentioning, that he is talking of canonical elections as of old, follows a chapter, upon what is a most important part of the consecration, or the perfection of the consecration of the bishop, canonical according to the foreign law, "*de receptione et auctoritate pallii*:" as your lordships well know, without the reception of the pall from the pope, the matter was imperfect. And then the following chapter is upon other matters which the bishop is to preserve after election. Therefore I think I gather from this book, that in treating of canonical elections according to the Roman law, there is a long discussion, first, of the persons who may elect, and persons who may be elected; that the disqualifications of the elected may be urged at the election; that objections to the electors may be raised at the election; that if there be an equality of votes, or an objection at the time, it may be again raised at confirmation; and that after confirmation, and upon consecration, there is no inquiry whatever. Then follows the investiture of the pall, which makes the bishop's appointment perfect.

I need not trouble your lordships by referring at length to the other works which my learned friend referred to. He referred to *Ferraris*, who, at page 218 (*u*), and in sections 6, 7, 8, 9, and 10 of article 3, treats of the same subject, and follows in fact, very nearly, the precise words of *Lancelottus*: the title is "*Confirmatio Electionis*;" the matter is precisely the same, with this exception, that he adds: "Confirmationes hisce non observatis factæ, ex eodem capite declarantur viribus omnino carere, irritæ et nullæ." Therefore, he says, if all these things are not done, if there is no citation, for instance, the whole confirmation is absolutely void. But this again, is, in truth, founded upon and extracted from an ordinance of the third council of Lateran, which has never been recognized in this country as an authority. And these matters, being extracted from that, follow, nearly verbatim, one upon the other, and point out the correct mode of a canonical election anterior to this act of Hen. 8. I am by no means interested in discussing, or endeavouring to trench upon, the strictness of that canonical election; for the stronger and firmer it is in the olden time, the more certain, I apprehend, is the construction which I shall put upon the statute of Hen. 8.

Now your lordships will find that if my learned friend be enabled,

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sent question.

(*t*) Vide *supra*, p. 31, n. (*s*).

(*u*) P. 457, vol. 2, of the Venice edition of 1782. Vide *supra*, p. 109.

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as he may, to refer to certain jurists writing in our own country, and to certain expressions that fell from judges or a judge, in our courts, they have taken the precise language, and are quoting from the precise authorities, which my learned friend refers to, as the basis of his argument, showing, therefore, that they have taken these matters inconsiderately, as applying them to the statute. Possibly I shall be able to show your lordships that these forms have been preserved, as matters of form, for another purpose; not for the purpose of adding solemnity to the confirmation, but for another purpose, equally valid and beneficial, which I shall point out when I come to that part of the argument. In truth, the passage to which my learned friend referred (*v*) in *Ayliffe*, p. 245, relates not to the election and confirmation of bishops, but to a canonical election, properly so speaking; canonical elections being, in those days, of priests, deacons, deans, canons, and every person having any influence or connexion in the church. Every one of those passages to which my learned friend referred in *Ayliffe*, related particularly to canonical elections; with this remarkable circumstance, that *Ayliffe* has a chapter (*w*) expressly referring to the election of bishops under the statute of Hen. 8, in which these requisites of canonical election are not attended to. I shall come to that passage immediately. *Lyndwood*, in the same way, follows the precise words in page 218; but unless I understand it to be the desire of your lordships, I do not think it right to state the same words over again, because they are a repetition of the matter. All this is the rule of the canon law, as is well understood and explained by the writings of those jurists, before the passing of that statute. I do not think it necessary to refer to more than the instance already mentioned, the creation of Cranmer, which took place in the 23rd or 24th of Henry 8, just before the passing of this statute; and it is useful to refer to that, to see how elections were conducted before the act. Your lordships will find it in *Burnet's History of the Reformation*, vol. 1, p. 259 (*x*). "In the end of January, the king sent to the Pope for the bulls for Cranmer's promotion:"—this is after the passing of the statute of the 23 Hen. 8, or the Statute of Annates—"In the end of January the king sent to the Pope for the bulls for Cranmer's promotion; and though the statutes were passed against procuring more bulls from Rome, yet the king resolved not to begin the breach till he was forced to it by the Pope. It may be easily imagined, that the Pope was not hasty in his promotion, and that he apprehended ill consequences from the advancement of a man, who had gone over many courts of Christendom, disputing against his power of dispensing, and had lived in much familiarity with Osiander, and the Lutherans in Germany; yet, on the other hand, he had no mind to precipitate a rupture with England; therefore he consented to it, and the bulls were expedited, though, instead of *annates*, there was only 900 ducats paid for them.

"They were the last bulls that were received in England in this king's reign; and therefore I shall give an account of them, as they

(*v*) *Supra*, p. 114.

(*w*) *Parergon*, p. 118.

(*x*) P. 234, Oxford edition of 1816.

are set down in the beginning of *Cranmer's Register*. By one bull he is, upon the king's nomination, promoted to be Archbishop of Canterbury, which is directed to the king. By a second, directed to himself, he is made archbishop. By a third, he is absolved from all censures. A fourth is to the suffragans. A fifth to the dean and chapter. A sixth to the clergy of Canterbury. A seventh to all the laity in his see. An eighth to all that held lands of it, requiring them to receive and acknowledge him as archbishop. All these bear date the 21st of February, 1533. By a ninth bull, dated the 22nd of February, he was ordained to be consecrated, taking the oath that was in the Pontifical. By a tenth bull, dated the 2nd of March, the pall was sent him. And by an eleventh of the same date, the Archbishop of York and the Bishop of London, were required to put it on him. These were the several artifices to make compositions high, and to enrich the apostolical chamber."

Your lordships see, therefore, the whole of this is done by the direct authority of the Pope; and it is important to see what authority the Pope had at that time. Upon the king's nomination, the Pope directed a bull to him, confirming his nomination, and one to the archbishop; a third to the dean and chapter to elect; another, directing the archbishop to consecrate; and another to invest him with the pall. So that everything, at that time, was supreme in the Pope. There was, in so far as that appears, no investigation or challenge of anybody; because it is absurd to suppose that, the Pope, who was infallible, having sent to his ministers a positive command to invest him with the pall, any interposition would be allowed to interfere with that ceremony. In passing, it may be as well to observe, that notwithstanding the charter of John (y), which required or gave a canonical election of bishops, in name, notwithstanding the statute of Henry 8, the appointment still of common right lay absolutely with the king. And according to the old authorities, even in these days, all bishopricks, of ancient creation and modern, are donative. It is strange to observe, and in passing I may mention it, that although a number of English bishopricks are donative, yet, by reason of the desire of persons who might profit by it, they are all elected by a *Congé d'élire*. There is a case reported, to which I will call your lordships' attention, in *Croke James*, p. 552, and also in *Palmer*, p. 22, in 2 *Rolle's Reports*, 101, and in *Fitzherbert's Natura Brevium*, quarto edition, 396; *O'Brian and Others v. Knivan*. That was a writ of error from the court of Queen's Bench, in Ireland. A person of the name of Bale had been appointed Bishop of Ossory in the reign of Edward 6. The direction to appoint him had gone to the deputy in Ireland; the deputy having left Ireland, he was appointed by the lords justices, by letters patent. After that, during the disturbances, he left the country, and went to France; and whilst he was still living, another bishop, a person of the name of Tonery, was appointed, in the reign of Philip and Mary, by *Congé d'élire*. The question was, whether the first bishop was well appointed; and it was argued he was not, because he should have

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Of common right, all bishopricks in England donative.

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been appointed, not by letters patent, but by *Congé d'élire*. A judgment having been given in the court below, a writ of error was brought here. I will now read from *Croke's Report* of this case, "A second reason that Bale was never bishop was, because the direction was that they should take order for his creation, and making him bishop, according to the laws of Ireland, which ought to be by writ of *Congé d'élire*; which being returned, then a patent should be made to him under the great seal there, and then a commission to consecrate him; and so is the law and use in England; and so was the use and law in Ireland till the statute, 2 Elizabeth, c. [4], made there, which gives authority to the queen and her successors to create bishops by their patent, without *Congé d'élire*(z); and so these circumstances shall not be observed, but an immediate creation by patent. But it was resolved, that this statute did not give to her any new power, but it was only a restitution of the common law, and that the king here, and also in Ireland, before the said statute, might create a bishop by his patent without any writ of *Congé d'élire*, which is but a form or ceremony which the kings of this realm have agreed to observe; but if they will not observe this course, it is well enough; wherefore this creation before that statute was good enough." The court, therefore, says in this case, referring to the statute of Henry 8, that it is "but a form or ceremony which the kings of this realm have agreed to observe; but if they will not observe this course, it is well enough; wherefore the creation before that statute was good enough." This case which I have cited to your lordships, clearly establishes, upon the authority of a writ of error, that notwithstanding the statute of Elizabeth, and the statute of Henry 8, out of which this question arose, the king might still appoint by letters patent; for it is but a form or ceremony, which the king may observe if he think fit; but if he do not, it is well enough.

That being so, and such, I apprehend, being the law with respect to canonical election before the statute, I come now to consider the effect of the statute of Henry 8, which, I apprehend, disposes at once of the whole of this question.

Effect of the
stat. 25 Hen. 8.

The 25th of Hen. 8, c. 20, recites the statute of Annates, the 23rd of Hen. 8, which is not printed at large with the other statutes(a); but it recites that statute at length, referring to the practice of bulls, which were obtained at great expense, for the election, confirmation, and consecration of bishops named, elected, presented, or postulated to the see of Rome, as I have mentioned. It dispenses with those, and states, in the second section, that the Pope had not yielded to the measures suggested to him for the remedy of those inconveniences; and then, in the third section, it proceeds thus:—"And forasmuch as in the same act, it is not plainly and certainly expressed, in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated within this realm:" therefore it proceeds to point out, as no precise mode has been hitherto stated, what shall be the mode. And there is this

(z) Vide *infra*, p. 140.

(a) Both statutes are given at length, *supra*, pp. 26, n. (r), 31, n. (s).

remarkable observation to be made here, and throughout the whole of the act: when they are talking of making a perfect bishop, the word *confirmation* does not occur—"as it is not plainly and certainly expressed in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated within this realm;"—treating, as the fact is, election and confirmation as one thing, and confirmation as a part of the election. "Be it therefore enacted, that no person hereafter shall be presented, nominated, or commended to the bishop of Rome, otherwise called the pope, nor shall send nor procure there for any manner of bulls; but such presenting and such bulls shall utterly cease and no longer be used." And then comes the mode of election. It says, you have not pointed out the mode: I will point it out. And the 4th section is this shortly. Upon a vacancy, the dean and chapter (we may leave out the abbots and friars) certify the vacancy to the crown; the crown sends a *Congé d'élire*, accompanied (and that is important) with a letter missive stating the person to be elected. The dean and chapter can only elect that one person. If they do not elect within twelve days, the crown names by letters patent; and then direction goes to the archbishop to invest and consecrate the person so named. If the election takes place by the dean and chapter, the direction to the archbishop is, to confirm the election, and to invest and consecrate the person. And then there are certain penalties, following immediately upon failure to do that.

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ment.

Now there is scarcely a passage in this statute, which does not show, at once and conclusively, that the whole of this matter of confirmation is a matter of form, which has been preserved, possibly, to keep up the historical evidence and connection between our Protestant and the ancient church, but which, in truth, is a mere matter of form. "And furthermore be it ordained and established by the authority aforesaid, that at every voidance of every bishoprick within this realm, the king, his heirs and successors, may grant to the dean and chapter of the cathedral church where the see of such bishoprick shall happen to be void, a licence under the great seal, as of old time hath been accustomed, to proceed to election" of the individual named, with a letter missive; which, *Gibson* observes, "is wholly new;" and he adds, "The election, from beginning to end, proceeds, *seemingly*" (he italicizes the word *seemingly*), "upon the *Congé d'élire*, without any appearance of restraint from the letters missive, and in the same manner, as if there were no such restraint; and the only circumstance remarkable in it, is, the solemn declaring of the person elected, to the clergy and people, assembled in the church; wherein we see the *footsteps* of the more antient way of electing, and of the part which they had in the election" (b).

Gibson.

Now, therefore, upon that matter, the crown, as the head of the church, both in this statute, and in the statute of Elizabeth (c) which revives it, consents to retain the form; but the object of both acts is, not to keep up that mode of election alone, but to assert the pre-eminence of the crown in matters spiritual as well as temporal. The crown, as the head of the church, settles who may be elected;

(b) 1 Gibs. Cod. 109, in not.

(c) 1 Eliz. c. 1.

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gument.

because the crown is to name the person whom the dean and chapter shall elect. And this disposes of one part of the section in *Lancelottus*. There can be no *co-electus* therefore; because no other person can be elected. It is quite plain that that part of the form is absolutely gone. There can be no *contradictor*, because the crown says, this person, and this person alone, shall be elected. And when I can point back to the old canonical form of election, and show, how, step by step, each branch is destroyed by act of parliament, I shall satisfy your lordships that the whole is a mere matter of form. There can be no *co-electus*; because the crown says, this person, and this person alone, shall be elected. There can be no *contradictor*; for the statute goes on: "By virtue of which licence, the said dean and chapter, or prior and convent, to whom any such licence and letters missive shall be directed, shall with all speed and celerity in due form"—(the phrase "*in due form*" cannot suppose a contest between any parties, because they must elect that man)—"elect and choose the same person named in the said letters missive to the dignity or office of the archbishoprick or bishoprick so being void, and none other. And if they do defer or delay their election above twelve days next after such licence or letters missive to them delivered, that then for every such default the king's highness, his heirs, &c., shall nominate, by letters patent under their great seal, such a person to the said office and dignity so being void, as they shall think able and convenient for the same." The crown therefore is made the judge of the fitness of the party. The crown is to nominate, if they will not elect, and to nominate the person to be elected, when the form of election, and the form only, is carried on. "And that every such nomination and presentment, to be made by the king's highness, &c., shall be made to the archbishop of the province." I apprehend therefore, in this section, it is plain that the election is a mere ministerial election; or, as *Gibson* says, it is *seemingly* an election, under the *Congé d'élire*, governed by the letters missive. The crown by its prerogative, as head of the church, is made the judge of the party's fitness, and is put in the place of the Bishop of Rome; for in express words it is here stated, that the crown shall judge of the person whom it "thinks able and convenient for the same," in the case of nomination. And where the statute says, of the person named in the letters missive, this person you shall elect, "and none other," the crown is made the judge of the fitness of the person. And that will at once shut out any inquiry in *personam electi*, which is another branch of the objection. The election or nomination having taken place, the fifth section follows; and my learned friend, if I understood him, reasoned thus:—You will find it requires and commands the archbishop to confirm the election, and invest the elected, using certain benedictions, ceremonies, and other things; and these must refer to the old canonical election and confirmation. I will show that is not so. The fifth section first takes the case of a nomination, there being no election. "That whensoever any such presentment or nomination shall be made by the king's highness . . . then the archbishop . . . shall *with all speed and celerity* invest and consecrate." Now these words are important, because they show there is no intention of

having the various delays arising from the exhibition of articles, answers, inquiries, and other modes. It says, "with all speed and celerity *invest and consecrate* the person nominate and presented by the king:" the word "*confirm*" is there not inserted, because there is no confirmation upon a nomination. He is to invest and consecrate—Now, in what way? "To give and to use to him pall and all other benedictions, ceremonies, and things requisite for the same, without suing, procuring, or obtaining any bulls, letters, or other things at the see of Rome." These last words, says my learned friend, must import the ceremony of confirmation without the pall. My lords, these words are used, not with reference to the ceremony of confirmation at all, but with reference to the investiture and consecration. They apply, in this branch of the section, to a case in which there is no confirmation at all, namely a case of nomination. In the case of nomination, therefore, it is plain, that the archbishop must confirm; no opportunity occurs of objection: none is given by the old jurists; and none is given by the present form; and nobody has a right to appear.

The 5th section proceeds to treat of the present case. "And if the said dean and chapter, or prior and convent, after such licence and letters missive to them directed, within the said twelve days, do elect and choose the said person mentioned in the said letters missive, according to the request of the king's highness, his heirs or successors, thereof to be made by the said letters missive in that behalf, then their election shall stand good and effectual to all intents." If they elect, it is to be good to all intents. But my learned friend says, the process of confirmation required that the archbishop should inquire into the *processum electionis*, into any objection to the process of the election, and should cite opposers; whilst the act says, this election shall stand good to all intents and purposes: they cannot therefore inquire into the *processum electionis*: that is plain upon this act, whatever may be said of the crown's right to judge of the fitness of the party. Into the process of election there can be no inquiry, because the act says, that election made in compliance with the *Congé d'élire* shall stand good to all intents. Now, pause there for a moment. The old jurists say it may be inquired into: the act says it shall not be inquired into; it shall be good for all purposes. Assume that your lordships make this rule absolute, and direct the archbishop and his commissioners to inquire into the doctrine of Dr. Hampden, or into any matter which persons may allege in their visionary notions, or party feeling, upon the subject; and assume that the matter is found, and the archbishop is satisfied; that any person—I will not use the name of Dr. Hampden, but—that any person elected is personally disqualified: what is to happen? Can the election be set aside? No: the election by act of parliament is declared to stand good to all intents. Then the result is this: if it be said that any command of your lordships is to relieve a dissenting archbishop from the penalties of this act, that the confirmation may be delayed for ever: there can be no bishop; because the election, being good to all intents and purposes, cannot be set aside. It is a statutory election; and being so, the bishop elect must remain a bishop elect until his death, and the see must remain vacant. This

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passage alone shows, that, whatever may have been the form pursued, and whatever the requisites of canonical election, where the archbishop could examine these matters;—this passage alone shows, that he cannot examine that, which is of the essence of the inquiry, *viz.* the election, and which if the queen, upon certificate to her under the chapter seal, is satisfied has been perfect, even though the election were made by persons not qualified by the canon law to elect, (taking the strongest possible case against myself), by persons not in the chapter; if she puts upon it the imprimatur of her authority by the letters patent, and approves of the election, the act of parliament says, upon her letters patent to the archbishop, that the election shall be good to all intents and purposes; and no authority without an act of parliament can investigate that matter. The election therefore is perfect to all intents.

Let us proceed therefore to examine what is to be done till the bishop elect is perfect in his title. “And that the person so elected, after certification made of the same election, under the common and covent seal of the electors, to the king’s highness, his heirs or successors, shall be reputed and taken by the name of the lord elected of the said dignity and office that he shall be elected unto.” All this has occurred in the present case: there is the certification under the chapter seal, and the letters patent ratifying it. The election is good to all intents and purposes. And he is to be taken and reputed to be the lord bishop elected of Hereford. And then, in order that the crown may be satisfied, the crown directs the archbishop to confirm: “And then, making such oath and fealty only to the king’s majesty his heirs and successors, as shall be appointed for the same, the king’s highness, by his letters patents under his great seal, shall signify the said election, if it be to the dignity of a bishop, to the archbishop and metropolitan of the province where the see of the said bishoprick was void, requiring and commanding such archbishop, to whom any such signification shall be made, to confirm the said election.” Now I will stop there: the act says, the election, having been made, shall be good to all intents and purposes: we may be satisfied we have got the right person; he shall take the oath of fealty first; and then the crown shall issue its letters patent, requiring and commanding the archbishop to confirm the said election, not to inquire into the sufficiency of the election, not to examine into the qualification of the person, but commanding him to confirm the election, which is said to be good, (the election and confirmation being but one thing), requiring the formal confirmation of that which the letters patent certified to be satisfactory to the crown. The act then goes on to draw a remarkable distinction, between the person and the election. My learned friend says, the act of confirmation involves an examination into the process of the election, and the qualification of the person elected. The act requires the archbishop to “confirm the election, and to invest and consecrate the said person so elected to the office and dignity he is elected unto, and to give and use to him all such benedictions, &c., without any suing”—and so on; applying therefore these words, as before, to consecration and investiture, and drawing a distinction between the “election,” which he is to confirm, and the “person,”

as that word is applicable to consecration and investiture, into which, by the canon law, no inquiry can be instituted at all. Then, in the same way, it follows, with respect to the election of an archbishop; "requiring and commanding the said archbishop" and bishops and so on, "to confirm the said election, and to invest," &c.

Now, my lords, it is remarkable that the word *confirmation* occurs only in that section. When the act points out the mode of making a bishop, it omits the word, as if it were perfectly unimportant. The thing having been done, it omits the word, and says this in the 6th clause:—"And be it further enacted, &c., that every person being hereafter chosen, elected, nominate, presented, invested, and consecrate to the dignity, &c., according to the form, tenor, and effect of this present act," shall be a bishop. Then again, when, in the 3rd and 4th clauses, it points out the form of making the bishop, it omits the word "confirmation," as perfectly unimportant, confirmation being in truth but a portion of the election; the election being but a shadow, and confirmation following; that shadow itself casting no shadow after it, but being entirely a mere form.

Then follows the penal clause, "And be it enacted, that if the dean and chapter of any cathedral church proceed not to election, and signify the same according to the tenor of this act"—I am told that one of my learned friends contends, that if the dean and chapter, instead of electing Dr. Hampden, had elected some one else, that would have been no violation of the act, and that it is only where they absolutely refuse to elect, that there is a *præmunire*. Your lordships see it is, "if they proceed not to election, and signify the same according to the tenor of this act," (that is, if they do not elect the persons named and pointed out in the letters missive) "within the space of twenty days next after such licence shall come to their hands; or else if any of them, or any other person or persons, admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of due execution of this act," and so on, they shall incur the penalties of the statute of *præmunire*. Now, my lords, I apprehend that that alone is the strongest argument to show, that it was not in contemplation to use these matters at all, in any way, but as a form. Whether they were introduced or not by any persons, from a desire to keep up the form of a connexion with the ancient church, it is absurd to suppose that the legislature would say, if for twenty days you by any means delay, you shall be subject to the penalties of *præmunire*, when, as my learned friend says, they are courting an investigation which of necessity must last more than twenty days; because, if this is to be heard, it is to be heard, I presume in a judicial form: there must be the appearance, the exhibition of articles, the answer, the issue joined, the inquiry. Nobody, if once the matter is opened, will say, where the delay is to terminate. And yet this act of parliament which my learned friend says, has prescribed a form which may lead to great delay, enacts, if you do delay by any means whatsoever for twenty days, you, the delaying parties, nay, every body who counsels it, shall be subjected to the statute of *præmunire*. I apprehend the imposition

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1 Edw. 6,
c. 2.

of such a penalty, dreadful as it is, shows that this was intended to be but a mere form; that the confirmation was to be merely nominal; that if the archbishop, in obeying the mandate of the crown, chose to have a form, it was to be but a mere form, to admit of no discussion or disputation; because, otherwise, the time might run out, which might subject the parties to the penalty of the statute. The greatness of the penalty appears, therefore, decisive to show, that if a form was to be used, it was to be only a form, and that there was no substance in it (*d*).

My lords, I apprehend, with reference to anything which has occurred since the act, the mere reading of the statute would satisfy the court that the archbishop has only to confirm, in obedience to the mandate of the crown, and that these forms, for which there is no authority whatever, have either been introduced as matters of form only, or have been improperly introduced. But there are legislative declarations that these are forms, and forms only. In the reign of Edward 6, a statute passed upon this subject, 1 Edw. 6, c. 2. I am reading now the part which is not printed in the statutes. I am taking it from *Burn*.

The *Solicitor General*. It is in *Gibson's Codex* (*e*).

The *Attorney General*. I am reading it from *Burn*, vol. 1, p. 201. The first part is sufficient. "Forasmuch as the election of archbishops and bishops by the deans and chapters, be as well to the

(*d*) In a debate, which took place in the House of Lords, after the conclusion of Dr. Hampden's case, (February 15, 1848) the Bishop of Exeter cited a remarkable passage from "*The Institution of a Christian Man*," prepared by Cranmer, revised by Henry 8 himself, and put forth by the authority of the latter about four years after the passing of the 25 Hen. 8, c. 20. A work appearing under such circumstances, his lordship contended, should be regarded as a public and state document, and must be taken as a contemporaneous exposition of the statute (*Hansard's Parl. Deb.* 3rd series, vol. 96, p. 642). The passage is as follows:—

"The second point, wherein consisteth the jurisdiction committed unto priests and bishops, by the authority of God's law, is to approve and admit such person as (being nominated, elected, and presented unto them to exercise the office and room of preaching the gospel, and of ministering the sacraments, and to have the cure and jurisdiction over these certain people within this parish or within this diocese), shall be thought unto them meet and worthy to exercise the same; and to reject and repel from the said room such as they shall judge to be unmeet therefore. And in this part

we must know and understand, that the said presentation and nomination is of man's ordinance, and appertaineth unto the founders and patrons, or other persons, according to the laws and ordinances of men provided for the same. As, for an example, within this realm the presentation and nomination of the bishopricks appertaineth unto the kings of this realm; and of other lesser cures and personages, some unto the king's highness, some unto other noble men, some unto bishops, and some unto other persons whom we call the patrons of the benefices, according as it is provided by the order of the laws and ordinances of this realm. And unto the priests and bishops belongeth, by the authority of the gospel, to approve and confirm the person which shall be, by the king's highness, or the other patrons, so nominated, elected, and presented unto them to have the cure of these certain people within this certain parish or diocese, or else to reject him, as was said before, from the same for his demerits or unworthiness." *The Institution of a Christian Man*, part 2, *Sacrament of Orders*; in "Formularies of Faith, put forth by authority during the reign of Henry VIII.," p. 109 (Oxford, 1825).

(*e*) Vol. 1, p. 113.

long delay, as the great costs and charges of such persons as the king giveth archbishoprick and bishoprick unto; and whereas the said elections be in very deed no elections, but only by a writ of *Congé d'élire* have colours, shadows, or pretences of elections, serving nevertheless to no purpose, and seeming also"—(and this is so to a melancholy degree in this case)—“derogatory and prejudicial to the king's prerogative royal, to whom only appertaineth the collation and gift of all archbishopricks and bishopricks, and suffragan bishops within his dominions: it is enacted,” &c. You have, therefore, in that statute of Edward, a positive legislative declaration, that it is a mere shadow. But it will be said that the words used are “the elections.” Granted: but the canon law treats election and confirmation as one thing, and says, that until confirmation there is no election, and that until you have searched the legal majority of the votes which have been given, so far as to ascertain that there is no *co-electus*, there is no election at all. But not so under the statute; for the statute says, the election shall be good and binding to all intents and purposes, because the crown has taken the matter into its own hands, and pointed out the person to be elected, has judged of the fitness of the person elected, and by the letters patent decides upon the propriety of this election. This statute was repealed by the 1st and 2nd of Philip and Mary, c. 8; and the only instance of a canonical election between that and the revival of the statute was the case of Cardinal Pole, whose case is mentioned by *Burnet* (*f*), that, with a sort of delicate diffidence, he would not take his high office till the morning of the execution of his predecessor. He was elected and confirmed by bulls from Rome in the ancient form.

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1 & 2 P. & M. c. 8.

Case of Cardinal Pole.

1 Eliz. c. 1.

The statute was revived in the 1st of Elizabeth, and it is important to call your lordships' attention to a single word in that act.

Mr. Justice COLERIDGE. Do you mean, the statute of Edward was revived?

The *Attorney General*. No: the statute of Henry 8. It was revived in words by Elizabeth; and I only refer to it to show that its object was not only to point out the mode of election, but to keep up the prerogative and pre-eminence of the crown. “May it therefore please your highness, for the repressing of the said usurped foreign power, and the restoring of the rights, jurisdictions, and pre-eminences appertaining to the imperial crown of this your realm,” to revive this act, among other things (*g*). It is therefore put upon the express ground of prerogative; not simply for pointing out the mode of election or nomination, but to revive the spiritual pre-eminence of the crown, as the head of the church, with all the authority which formerly was usurped by the Pope, of judging of the fitness of the party, and sanctioning the election. It was, therefore, for the purpose of reviving the pre-eminence of the crown in this realm, that the statute of Henry 8 was revived.

But, my lords, in order that the matter may not seem to have passed loosely in statement or discussion, the statute of Edward 6

2 Eliz. (Ir.) c. 4.

(*f*) Hist. Reform. vol. 2, p. 614 (Oxf. ed. of 1816).

(*g*) 1 Eliz. c. 1, s. 3.

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Ireland, do-
native.

Hargrave's
note, 215, to
Co. Lit. 134 a.

is repeated in the reign of Elizabeth, in an Irish statute, the 2nd of Elizabeth, c. 4, in the Irish Statutes. "Forasmuch as the elections of the archbishops and bishops by deans and chapters within the queen's majesty's realm of Ireland at this present time, be as well to the long delay as to the great costs and charges of such persons as the queen's majesty giveth any archbishoprick or bishoprick unto: and whereas the said elections be in very deed no elections, but only by a writ of *Congé d'élire* have colours, shadows, or pretences of elections, serving nevertheless to no purpose, and seeming also derogatory and prejudicial to the queen's prerogative royal, to whom only appertaineth the collation and gift of all archbishopricks and bishopricks, and suffragan bishops, within this her highness's realm: for a due reformation hereof, be it therefore enacted by the queen's highness, with the assent of the lords spiritual and temporal, and the commons in this present parliament assembled, and by the authority of the same, that from henceforth no such *Congé d'élire* be granted," but the queen is to appoint by letters patent. And from that time the bishopricks have in practice, in Ireland, been donative, and at this day are donative; and your lordships will recollect, in the case I mentioned from *Croke James(h)*, it was said, that, before that act, and notwithstanding the statute of Hen. 8, as even at this day, all bishopricks are donative.

Now such, my lords, is the true construction of the statute of Hen. 8; and such is the legislative declaration of the meaning of that act of parliament, that it is a mere shadow and pretence, derogatory to the king's prerogative, and costly to the parties elected.

Now let us see if there are any authorities in this country upon that subject. Your lordships will find some very learned notes upon this subject, in *Butler and Hargrave's Edition of Coke upon Littleton*, in treating of the statute of Hen. 8, and likewise discussing the mode of appointing to ancient deaneries where there is no statute. In the note 215, p. 134 a, which is a note to the passage I read before (i), it is said, "notwithstanding the repeal of the 1 Edw. 6, the election of bishops is, as that statute emphatically expresses it, mere *shadow, colour, and pretence*."

Mr. Justice COLERIDGE. Is that before *Hargrave's* note begins? Is it *Hargrave's* note or *Butler's* note?

The Attorney General. It is *Hargrave's* note.

Lord DENMAN. Yes, it was discussed very much in the case of the *Dean of Exeter (j)*.

The Attorney General. "But notwithstanding the repeal of the 1 Edw. 6, the election of bishops is, as that statute emphatically expresses it, mere *shadow, colour, and pretence*; for by the 25th of Hen. 8, if they do not elect the person recommended by the king's *letter missive*, which accompanies his *Congé d'élire*, they incur the

(h) *O'Brian v. Knivan*, Cro. Jac. 552; *supra*, p. 131.

(i) *Supra*, p. 126.

(j) See *Reg. v. The Chapter of Exeters* 12 Ad. & Ell. 512; which

resulted in the passing of the act of 2 & 3 Vict. c. 14, ("an Act for removing doubts as to the appointment of a Dean of Exeter, or of any other Cathedral Church.")

penalties of a *præmunire*. See s. 7. There is no such statute now in force, in respect to deaneries, which we have observed in a former note; and yet the election to the *old* deaneries is in practice controlled by the king's letter missive, as much as the election to bishopricks." And then he refers to a note (*h*) which is to be found in page 95 *a* (in the chapter of Frankalmoigne) upon ancient deaneries; which is important, as showing, from precedent and from the authorities which are there collected, that by the king's prerogative though, there is no statute applicable to the appointment of deans, like that which in bishops' cases controls the election by the letter missive, yet the crown has, as of prerogative, the appointment to all ancient deaneries; and though there is a form of election, it is a mere form, and the crown actually appoints: showing, therefore, most strongly, that even according to the ancient law of this realm (and we are now, upon this most important matter, speculating without the slightest means of leading us to a just conclusion, as to what was the ancient law and practice of this country, with respect to bishops) the crown had then, as it has now, in the case of deaneries, where there is no act of parliament to control the election, the absolute appointment to the vacant deanery. It is said by the old authorities to be so. We find, historically, many assertions of that right. We find, even to this day, that deaneries, which are not affected by the statute at all, are in the absolute direction of the crown. And I want to know now, if there were no statute, whether this court, a court of common law, is to go blind-fold, as it must, into the canon law of this country, and to find out—and that so clearly and distinctly, that it can interfere by mandamus,—any law which, before this statute, gave the right of canonical election of bishops in this country. There is no such law that I am aware of.

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The Attorney General's argument.

Crown's right of appointment to ancient deaneries.

In the same way, your lordships will find that in the same book to which I have referred (*l*), p. 127, *Ayliffe* talks of the election of bishops. In the part previously referred to, he treats of canonical elections, generally; canonical elections of various persons: and there he speaks in the passage to which my learned friend has referred (*m*), borrowing from *Lancelottus* and others, about the mode of citing people and so on. In bishops' elections, at p. 127, he does nothing of the sort. He says, "The parliament in Hen. the 8th's time passed an act," and he gives an abstract of it; and they proceeded to their election, "which is done after this manner, viz. the dean and chapter having made their election, must certify it to the king and then the king gives his royal assent, under the great seal, directed to the archbishop, commanding him to confirm and consecrate the bishop thus elected. And the archbishop subscribes it, viz. *Fiat confirmatio*; and grants a commission to his Vicar General, to perform all acts requisite to that purpose. Thereupon the Vicar General issues forth a citation to summon all persons who oppose this election, to appear, &c., which citation is affixed by an officer of the Arches on the door of Bow Church, and he makes three proclamations for the opposers, &c., to appear; after the same officer certifies what he has done to the Vicar General; and no person

Ayliffe.

(*h*) Hagr. n. 4, 95 a, (105).

(*l*) *Supra*, p. 130.

(*m*) *Supra*, p. 114.

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appearing, &c., at the time and place appointed, &c., the proctor for the dean and chapter exhibits the royal assent, and the archbishop's commission directed to his Vicar General, which are both read, and then accepted by him. Afterwards the proctor exhibits his proxy from the dean and chapter, and presents the new elected bishop to the Vicar General, returns the citation, and desires that three proclamations may be made for the opposers to appear: which being done, and none appearing, he desires that they may proceed to confirmation *in pœnam contumaciæ*." And so he treats it. But, in another part of his work (*n*), when talking of canonical election, he goes through the various modes in which it was to be done. He treats confirmation as a mere matter of form: no person appearing, terms are immediately assigned for doing the act, which, if the parties were to come in and appear and be heard, would be utterly impossible.

Gibson.

In the same way your lordships will find that *Gibson*, a very learned author, in treating of the matter, thus points out his view of the statute. He gives the statute at length, in his *Codex*, p. 109; and, in a note to the words, "a letter missive," he says: "This is wholly new; and the language of it being thus, 'We have been pleased by these our letters patents to *name* and recommend *him* unto you, to be elected and chosen,' the only *choice* the electors have" (and he italicizes the word '*choice*') "under this restraint, is, whether they will obey the *king* or incur a *præmunire*." That is therefore what *Gibson* says about it; and then he says, on the words "in due form:" "The election, from beginning to end, proceeds, *seemingly*, upon the *Congé d'élire*" (and the word "*seemingly*" is in italics) "without any appearance of restraint from the letters missive, and in the same manner, as if there were no such restraint; and the only circumstance remarkable in it, is, the solemn declaring of the person elected, to the clergy and people, assembled in the church; wherein we see the *footsteps* of the more ancient way of electing, and of the part which they had in the election." Clearly therefore showing, that his notion was, that the whole thing was *seemingly* an election, to keep up and preserve the same forms, for the satisfaction of the scruples of weak minds; keeping up the footsteps of the ancient mode of election, and having things *seemingly* to proceed upon the *Congé d'élire*, though in truth the whole proceeding is a matter of positive form, and they have only to choose the person named by the king, or incur a *præmunire*.

Then he proceeds to the confirmation, the method and order of which, he says, is so and so; and then he points out different things. The letters patent are produced, the citation is made against all opposers of the confirmation, "as well to notify the day of confirmation, as to cite '*omnes et singulos oppositores*,'"—(and then he gives the exact words from *Lancelotus*—) "to appear on that day: according to the direction of the ancient canon law, where it makes all confirmations void, that are performed, *nullis vocatis et non discussio negotio*." Does my learned friend mean, from what is said here, to contend, that if there is no discussion and no citation, the

confirmation made by the archbishop will be void? He must say so. He cannot stir, without satisfying the court that this confirmation is absolutely void, and that the proceeding is invalid without it.

He then adds: "*Vocationem autem hujusmodi nominatim, ubi est coëlectus, vel apparet oppositor.*" There can be nothing of the sort, as to the election, for it is absolute. Then there is the first schedule; and then the summary petition, which "is the petition of the proctor that the bishop elect may be confirmed, upon his alleging and proving the *regularity* of the election, and the *merits* of the person elected"—(I beg your lordships' attention to this): "which he does in nine articles;" and he sets them out. "All which articles conclude with a petition, that, in pursuance of the premises, confirmation, &c. may be decreed. Then the *Summaria Petitio* is admitted, and the court decrees to proceed *summarie et de plano*, and assign him a term *ad statim* to prove the particular matters contained in the petition." Now comes the point. How does he prove them? Does he enter into evidence on the subject? Nothing of the kind:—"for proof of which, he exhibits the process of the election made by the dean and chapter, the consent of the archbishop, and the royal assent." Therefore he produces those documents as conclusive evidence of every thing having been done; both that he is fit in person, that the election is good, and every thing as it should be; against which there can be no appeal. And then there is the reason why, possibly, the form is observed, and that which may give vitality to the form, and still save all objection: the proctor of the dean and chapter, not the proctor of the bishop, but the proctor of the dean and chapter, judicially presents Dr. Hampden to the archbishop, thus precluding, by that solemn proceeding, every opposition.

My learned friend says that all these matters are mentioned in *Gibson*, as being requisite. They are required as matter of form; but the proof that they have been observed shows the absurdity, I was going to say, of so requiring them. How is it proved? It is proved in the mode pointed out in the statute. The process of the election is proved by the certificate. The signification of the queen's pleasure is proof of the fitness of the elect. The matter is done immediately, *ad statim*; which is inconsistent with any thing like discussion. And then of course the whole thing is concluded by the production of the document, which the statute makes binding, in terms, and in substance, upon all parties.

Now what are the authorities which my learned friend has mentioned on the other side? He has discovered,—having had, to assist him, the great industry and learning of my learned friends, who at all events do not come new, as we do, to this matter,—some cases which he has cited: the case of *Parker*, to be found in *Strype's Life of Parker*, and in *Burnet (o)*. What was that case? Parker had the greatest objection to fill the office of archbishop. He had remonstrated over and over again. (He succeeded Cardinal Pole, as your lordships recollect, in the 1st of Elizabeth.) He was elected in a way which,

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The Attorney General's argument.

Mode of proof excludes the possibility of inquiry.

Case of Archbishop Parker.

(o) *Strype's Life of Parker*, Book 1, ch. 8, p. 34 (fol. ed. of 1711); *Burnet*, *Hist. Reform.* vol. 2, pp. 681, 720 (Oxf. ed. of 1816); *supra*, pp. 43, 56.

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gument.

I think, then was unusual, but happily now does not prevail, because it might cause a discussion. A *Congé d'élire* went to the chapter of Canterbury; there was no letter missive at all: the thing was just in a state of transition, from the ancient to the modern mode. There was a practice then, by concordat or arrangement, of delegating the authority of the chapter to an individual. The case is not applicable to the present, as the chapter allowed the dean to elect whomsoever he thought fit. The dean did not elect himself, but he elected Parker. The letters patent to confirm went to three bishops by name; they were bishops of the Roman Catholic religion. It was hoped, not only that they would confirm, but that they would conform; and it was not intended that there should be any interference with what was then of great importance, that the bishop should go with the spirit of the times, and conform to the established religion. They refused to confirm; and the result was, that other parties were named, who were bishops elect; and before those persons (not being bishops), certain discussions were entered into; the election in truth being an election under no statute, with no letters missive, being partly an election under the old system, and partly under the new system. The prerogative of the crown was controlled; there were no letters missive, and the parties entered into those discussions. But it is enough to say, with a very eminent person (*p*), that little weight can be given to a precedent of times like those; still less, when all we can gather of the case is from the biography of the party. What the nice and difficult questions and matters of law were, was not apparent to the party treating on the subject, and is not noticed in the work under discussion. It is plain, if it be pressed to the full, it is no authority; because there, if the statute of Hen. 8 was in full force, they clearly could not examine into the process of the election: yet, according to some people, it is supposed that these bishops did enter into the process of election, and consider whether it was right for the electors to delegate to the dean the power of that election. By the act of parliament, they clearly are stopped from that. It is, in truth, no precedent or authority; for we have no means of entering into the minute details, the examination of which could only make it an authority.

Mountague's
case.

I will now beg leave to refer your lordships to *Burn's Ecclesiastical Law*, which gives a passage from *Collier's Church History*, and which my learned friend mentioned in moving for this rule (*q*). Now I do not dispute the high authority of Dr. Rives mentioned there; he was not a judge of the court; he was not the Vicar General; he was a deputy, I think, for the bishop,—he was a surrogate. The case is really no authority upon the subject. It is mentioned at page 207, extracted from *Collier's Ecclesiastical History*. "Soon after the recess of parliament, Bishop Laud was translated from Bath and Wells to London, and Mountague promoted to the see of Chichester." Mountague was a man greatly obnoxious to the parliament; they voted him all sorts of things, and they were greatly surprised, one fine morning, to find he was appointed Bishop of Chichester; upon

(*p*) Dr. Lushington, *supra*, p. 60.

(*q*) *Supra*, p. 101.

which, two persons were deputed to make opposition; one Jones, a bookseller, was one of them. It was a struggle between the parliament and the crown; and upon that offer, "Dr. Rives, who then officiated for Brent, the Vicar General, disappointed this challenge. For Jones had made some material omissions in the *manner*, and not offered his objections in form of law," (this is the historical account of it,) "particularly, the exceptions were neither given in writing, nor signed by an advocate, nor presented by any proctor of the court." This is the way the historian records that matter; he is wrong, because the rule of that court, like this, is, that any person may appear for himself, as a party promoting a matter, without a proctor. However, there was reason for the objection there taken by the court: Dr. Rives did not want to say "we will not hear you," and so bring himself into direct contact with the parliament, then contesting with the crown; but if he could give any colour of reason for not allowing the objection to Mountague, he would do so; and he took that objection:—"particularly the exceptions were neither given in writing, nor signed by an advocate, nor presented by any proctor of the court. Upon the failure of these circumstances, the confirmation went on." There stops the extract from *Collier's History*; but then Dr. Burn, I believe, in the original edition, says, "The parliament, not at first apprized in point of form, were dissatisfied with the conduct of the Vicar General, and inquired into the behaviour of Dr. Rives on that occasion. Upon which it hath been observed, that Dr. Rives, a most eminent civilian and canonist, admitted that the opposition was good and valid, had it been legally offered; and that the parliament of that time proceeded upon the same opinion." Now there is no authority for that; on the contrary, in searching the parliamentary history, there is not a word upon the subject. The discussion takes place, but no excuse is given by Dr. Rives: and it is simply here a note of a collector or compiler, that *it was said* that Dr. Rives so said, and not that he said it in his report to the House of Commons; but if he had, I may well understand he might say, Do not lay your indignation upon me in this matter; if the objection had been regular, I would have taken it. Would that be any authority under circumstances of that sort? My learned friend says there were no troublous times then. Why, it is notorious, as a matter of history, that Mountague was a party greatly obnoxious to the House of Commons, and that they had deputed a person to stop his confirmation, if he could, for the mere purpose of carrying out their views of dissatisfaction against the crown.

But we are talking of matters of authority. Though I cannot take the statement of Dr. Burn of what *has been observed* (which can be found nowhere), I think I may mention to your lordships without any disrespect, an authority which, with those who are acquainted with the great learning of the author, must be of considerable weight. I refer to Sir James Marriott (*r*), who was Queen's Advocate in 1764, and who was afterwards judge in the Admiralty Court. I have before me his manuscript *Book of Practice*, and collection of cases. It is drawn with the greatest care, after access to books not now found,

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Sir. J. Mar-
riott's MS.
*Book of Prac-
tice.*

(*r*) Concerning whom, see Dr. Irving's "Introduction to the Study of the Civil Law" (fourth edition), 118.

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ment.

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Ascuithe, no
authority upon
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subject.

which were, I believe, and may be now, in Trinity Hall Library, and which are of great authority. There are extracts, in his own handwriting, of various matters from various authors; and, under title Confirmation, I find this: "Confirmation must be dispatched within twenty days, otherwise a *præmunire* is incurred. Therefore, there needs no citation of opposers, nor are they to be heard if they offer. See 25 Hen. 8, c. 20, MS. no. 6, also *Eden's Practical Observations*." Now I gather from other parts of the work, that Dr. *Eden's Practical Observations* is a book of practice in the ecclesiastical courts, now being in Trinity Hall Library. I will hand up the book to your lordships. He brings, at all events, his high authority to bear upon the subject, filling as he did the high offices of Queen's Advocate and judge of the Admiralty Court; and he states, after his researches, his views of the necessity of citation, and of hearing opposers if they shall appear.

My lords, the only other case mentioned by my learned friend (r), was the case of *Evans v. Ascuithe*, reported in *Palmer*, 457, and reported likewise in Sir *William Jones*, in *Noy*, and in *Latch*. The question was this. One Thornbury, being Dean of York, and Bishop of Limerick, held the deanery of York by dispensation; he was translated to the bishoprick of Bristol; and a lease being signed by the dean and chapter, in which he concurred, between the election, under the *Congé d'élire*, and the confirmation, the question was, whether or not the election was perfect, so that the deed was inoperative, he being not a proper party. There was no election. (I was wrong in speaking of an election—there was no election—it was a translation.) The matter was discussed at considerable length. It did not occur to any one, through the whole of that case, to consider the statute of Elizabeth which I have mentioned (s), which made the Bishoprick of Limerick donative; nor did they advert to the fact of Bristol being of new creation; but they treated the whole as if Bristol were of ancient creation. In the course of the discussion, *Whitlock*, J., adverts to a very excellent work, as he calls it, *Lancelottus*; and (not for the purpose of giving any judgment in that case, or collecting any authority for such a judgment) he takes various statements from the canonists, for the purpose of ascertaining when the election was perfect: and seeing from *Lancelottus* that an election, according to the canon law, is not perfect until confirmation, and that, as *Ayliffe* pronounces it, election and confirmation are but one, he historically illustrates his judgment by reference to that work; and then this passage occurs: "And it was agreed by all the judges, that by the election only, until confirmation, the bishop had nothing in him, either in the case of translation, or in that of creation....The name is not changed in the case of creation until consecration, but the name is not changed by confirmation." According to the old law, when an election took place, and it was confirmed, the name was changed. It is not so now, because the act says, that by the election the name shall be changed: the election, it is declared, shall stand good to all intents and purposes, and the party shall take the name upon his election; whereas, under the ancient law, until the confirmation, says *Whit-*

(r) *Supra*, p. 107.

(s) 2 Eliz. c. 4 (Ir.), *supra*, p. 139.

lock, the name did not change. That is a most important deduction from this case, in favour of the view which I take. The name is not changed, it is there said, until confirmation, and it is as much as to say, the party is *tanquam embryo in utero*, and until confirmation he can be vouched; and for this reason it is, namely, that before confirmation there is a citation of opposers made to this day. That is the passage to which my learned friend referred. That passage is, in truth, an historical illustration of *Whitlock's* argument, gathering it from the practice under the old canon law; as deduced from the treatise of *Lancelottus*, which, he states, is a very excellent book. He is wrong if he construes it in reference to the statute; because the statute says, upon election the name shall be changed, and *Whitlock* says, it shall be changed upon confirmation. I apprehend, therefore, what he says, is no authority of any value upon this subject. It is, in truth, nothing but an *obiter dictum*, because the question did not arise in the case before him. It is not assented to by the rest of the judges. It is not found in the other reports. And in truth, it is argued, as I have before said, having regard to the ancient mode of confirmation and election, for the purpose of ascertaining, not how confirmation should take place, but when the election is perfect. He says; as, by the canon law, the man did not change his name until confirmation, so here, though it be but a nominal election, until confirmation it is not perfect. I apprehend, upon a consideration of it, that case, which is the only case, can be deemed no authority.

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The Attorney General's argument.

It is true, I think, that in *Salkeld (t)*, there is a kind of digest on the subject; it is a mere deduction, however, from other cases, and cannot be relied upon on one side or the other. There is no decision reported in *Salkeld*.

I have gone through, therefore, my lords, what I believe is a clear and decisive argument against this application for a mandamus. I have endeavoured to point out to your lordships, shortly, what was the ancient form of canonical election and confirmation. I have shown, and I wish to impress it strongly upon the court, that various things were required in that election; among them, the form of the election, and, if you like, the qualification of the party. The act of parliament of Hen. 8, however, has deprived the confirming party of the power of investigating most of these things. If the form be substance, it is substance as to the whole, I admit. If the form had been altered to meet the circumstances of the case; if it had been applied to other things which it might be requisite to prove, such as identity, and so on; I admit there might have been something in the argument. But the whole of the form is preserved. The Apparitor cites everybody, for the purpose of entering into every one of the questions; whereas, upon the loosest construction of the statute, parties are prevented entering into any of them. And I apprehend, when the court looks into the nature of this objection, seeing that no mandamus will be granted by your lordships to enter into an inquiry which can result in no kind of utility, the court will think that the statute in its construction is decisive as to this application.

Inconsistency of preserving the whole of the old form unaltered, unless a mere form.

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Archbishop of
Canterbury.

The Attorney
General's ar-
gument.

Contumacy the
foundation of
every judgment
in the spiritual
courts.

Analogous
cases: chal-
lenge at the
coronation;

Form on the
creation of
judges;

Colour, in
pleading.

Reason why
the *form* of
confirmation
was preserved.

But my learned friend says, and says with some apparent truth, if these are mere idle forms, why are they persisted in? Why do you call upon these parties to appear? Why do you go through the form of pronouncing them contumacious for not appearing? My lords, the word *contumacious* is the foundation of every judgment which is given in the spiritual courts. They are contumacious if they appear and do not shew a good ground. They are contumacious if they do not appear. But it is enough for me to say that the act of parliament, which states how bishops are to be made and created, either, omitting the word "confirm," requires no such form at all, or else permits it as a form, and a form only; and it is not because the church, or those who administer the spiritual jurisdiction of the church, have persisted in preserving the form, that therefore substance is to be given to what was never intended to possess it.

There are many analogous cases which may be mentioned. The form of the most solemn observance in this country requires that the whole world shall be challenged in defence of the dignity and right of her majesty to the crown. If the challenge were accepted, would your lordships grant a mandamus to the lord high steward to fight it out? In the creation of your lordships, it is a qualification that you should come from the Court of Common Pleas. But the crown is the judge of the qualifications for the bench, as of the fitness of persons to fill the office of a bishop; and is that less the case, because custom prescribes that your lordships should first be made serjeants? Again, what can be so absurd as the ordinary course of "*colour*" in pleading? But would it be tolerated that parties should be allowed to traverse the colour, because it is the mode resorted to in order to obtain substantial justice?

I can well understand why, though the act did not point it out, those who were interested in the election of bishops should preserve this form. Though protesting against the errors of Rome, there was in that day, as in this, an anxious desire to perpetuate a reverence for the establishment through which the Apostolical descent of the heads of the church was to be traced; and it is not impossible, that those who yielded to the scruples of weak consciences in a more solemn matter, may have preserved the form, for the purpose of preserving the historic proof of that Apostolic connexion, without intending that that which was mere form should possess any substance that could at all interfere with the prerogative of the crown. It is not for me, however, nor am I bound to present any reason to your lordships for that form having been preserved, or to show why, being but a shadow, it has been retained, if I have satisfied the court, as I trust I have, upon the true construction of the statute, that the archbishop, when required to confirm, under a penalty which is tremendous, has no right to enter, and cannot enter, into an inquiry which, even if it be availing, can nevertheless have no operation upon the election which is said to be good and binding to all intents and purposes; an inquiry, which can only have the effect of leaving the spiritualities of the see unadministered; the temporalities being in the bishop, till his death, without the power of impeachment, because the crown, as the head of the church, is to be the judge of his fitness, (its minister taking the responsibility) and commands the archbishop to do, I apprehend, a ministerial act.

I fear I have troubled your lordships at too great length upon this first point. I will proceed now to point out to your lordships objections which, I apprehend, are conclusive, without speculating upon this matter,—though I am interested, standing here as the Attorney General, in having the decision of your lordships upon the undoubted prerogative of the crown—objections, which are decisive against this motion, even if that other objection did not exist. In the first place, I take it to be a well known rule, that if the court of the archbishop be a court of competent jurisdiction, the Queen's Bench will grant no mandamus, although it will grant a prohibition if the archbishop's court exceed its jurisdiction. Admitting the qualification, that where the matter under discussion involves a temporal right, as well as a question of ecclesiastical cognizance, there, and there only, this court will interfere; still, where the matter is peculiarly of ecclesiastical cognizance, this court has no more right to visit by mandamus a court acting within the limit of its own jurisdiction, and in that respect co-ordinate with this court, than it has to grant a mandamus to the Vice Chancellor.

Lord DENMAN. The ground upon which it was stated by Sir *Fitzroy Kelly* that he moved for this mandamus, and the ground upon which the court wished to have the case argued, that the matter might be considered, was, the assumption that the confirmation was altogether void without this part of it, and that therefore the matter was left imperfect by the queen's officer, whose duty it was to make the matter perfect. And, upon this subject, it has occurred to me to ask whether, if the archbishop had refused to proceed to confirmation, you would say, on the part of the crown, a mandamus would not lie to compel him?

The *Attorney General*. I say it would not certainly. I am not here, however, to argue that point. The statute has pointed out a remedy.

Lord DENMAN. A *præmunire*?

The *Attorney General*. Yes, a *præmunire*; that is the punishment.

Mr. Justice COLERIDGE. That would be met by many decisions. That would punish the party, but would not give a remedy.

The *Attorney General*. I apprehend, though I am not bound to argue that question, that there is a great distinction. Assuming I am right in my view of the act of parliament, that it is a mere ministerial act, a mandamus will lie to an officer to do a mere ministerial act.

Lord DENMAN. Will it not apply if a judge refuse to undertake a judicial duty? In the other alternative, if it is a ministerial act, you do not deny it; but, if it be judicial, are we not constantly doing it?

The *Attorney General*. I am not aware of any such case, unless it be in a temporal matter. There are cases in the ecclesiastical courts which I am going to mention. A single word, however, upon that other point. I apprehend, if I am right in my view of the case, and the duty is merely ministerial, there is an end of the point; because the archbishop, whether he hear or not any objection, is bound to do it.

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The *Attorney General's* argument.

Mandamus does not lie, in matters of purely ecclesiastical cognizance.

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The Attorney General's argument.

Mr. Justice COLERIDGE. The case put was an entire refusal to confirm at all.

The *Attorney General*. I am coming to that immediately; but my learned friend says further,—the confirmation is void, because you have not done certain acts. Where does my learned friend find any authority for that?

Lord DENMAN. That is another thing.

The *Attorney General*. The only authority he can find is in the 10th section, I think, of *Ferraris*; in which, repeating various other matters, *Ferraris* (*u*) (being no authority at all on the subject, and taking it from the 3rd Council of *Lateran*, which is no authority, and was never acted on, in this country), says,—if these things are not done, namely, if you do not examine as to the co-electus,—

Lord DENMAN. I put the question upon an assumption.

The *Attorney General*. No doubt: I am coming to that immediately. These things, he says, not being done, the whole matter is void. Then your lordship says, assuming the archbishop refuse to confirm at all, will you be satisfied with a *præmunire*? If it be a ministerial act, I apprehend the court might and will grant a mandamus. But if it be a judicial act, it is a matter, I apprehend, of considerable doubt, whether the court would do so; with this exception, that if there be a mere right, which may come in conflict, or if the question may be the foundation of temporal rights, which are within the jurisdiction of the ecclesiastical court, the court will grant a mandamus. There are instances to be found in Lord *Raymond's Reports* (*v*), in which the court has granted a mandamus to the ecclesiastical court to compel it to grant probate. That is put upon the simple ground, that as the probate conferred a temporal right on the party who sought it, the ecclesiastical court was bound to confer that temporal right. And here there is a great distinction. The application might be at the suit of the crown, to enforce its prerogative. It might be an application of the bishop, to confirm his title, which vests him with the temporalities of the see. But who are the parties applying here? Have they any temporal right which is in question? None whatever. I was going to mention that as one of the grounds of objection I have to urge against this rule. The court will understand this distinction. It is a known rule that no mandamus will lie from this court for matters not of a temporal nature. In the case of the *King v. St. Peter's, Thetford* (*w*), which I am about to mention presently upon another point, the court refused to grant a mandamus for church rates. But in a recent case (*x*), where an act of parliament has said that parties

Distinction between a ministerial and a judicial act, with reference to the granting of a mandamus.

Mandamus to grant probate.

Here, the parties have no temporal right at stake.

Rex v. St. Peter's, Thetford.

Reg. v. St. Margaret's, Leicester.

(*u*) *Bibliotheca Canon. Confirmatio*; Art. iii.

8. Confirmationes hisce non observatis factæ ex eodem capite declarantur viribus omnino carere, irritæ et nullæ.

9. Examen, seu informationem esse faciendam non tantum circa electionis processum, sed etiam personam electi, declarat Lateranense Concil. sub Innoc. III. celebratum.

10. Quod tria præcipue inquirenda

sunt in personâ electi, videlicet, ætas legitima, morum honestas, et literatura sufficiens, scribit idem Innoc. Archiepiscopo et capitulo in cap. 19, &c. Vide *supra*, pp. 109, 113, 129.

(*v*) Raine's case, 1 Ld. Raym. 262; Bishop of St. David's v. Lucy, ib. 544.

(*w*) 5 T. R. 364; *post*, p. 157.

(*x*) The Queen v. St. Margaret's, Leicester, 8 Ad. & Ell. 889. S. C. 1 P. & D. 116.

shall make church rates, which gave a temporal right that would put this court in motion, the court has distinguished that from a purely ecclesiastical question, and has granted a mandamus to make a rate, and not merely to meet in order that they might make a rate. With respect also to the question of probate, this court will grant a mandamus to a court which has refused to grant a probate to the party entitled to it, not which has granted it to a wrong party, but which has refused to entertain the question; because there is a temporal right in dispute between the parties, and the party whose right is affected has clearly a *locus standi* before the court. It might well be, therefore, that the bishop of Hereford, who has an inchoate right to these temporalities, might come to this court to ask your lordships to give him those temporalities; or the crown might come, and say, I ask for my right to enforce my prerogative. But who are these parties? They have no temporal rights. Their question is a mere question of doctrine and ecclesiastical jurisdiction.

Mr. Justice COLERIDGE. They are all incumbents in the diocese, I understand?

The *Attorney General*. Two of them are; and two are as good as a hundred; but that gives no temporal right.

Mr. Justice COLERIDGE. It is the appointment of a judge, whose decisions might affect their temporal rights.

The *Attorney General*. There is no instance that I know, of a mandamus *quia timet*, because something is done which may hereafter affect these parties. Take this then to be a court. The rule, I apprehend, is this. If the court acts within the scope of its jurisdiction, upon matters which are within its jurisdiction, right or wrong, it is a matter of appeal. If it exceed its jurisdiction, it is a matter of prohibition. If it is a matter of temporal right, and there is no judgment, this court will interfere: but not if there has been a judgment; for then there is an appeal. There are many cases of that sort, which I will not weary your lordships by going through;—cases where the question of conclusive judgment arises. They are to be found collected in the first volume of *Phillipps on Evidence*. They all carry out the same general principle. In the ecclesiastical courts, the question of marriage is one of exclusive jurisdiction. Questions of probate are also matters of exclusive jurisdiction. If in a question as to the right of a next of kin to administration, where an ecclesiastical court had decided that A. B. was not the right party, but had adjudicated the administration to C. D., your lordships were to grant a mandamus, you would be usurping the powers of the privy council, which is the court of appeal from such a position. Your lordships would be taking, by mandamus, the appeal from that court; and with this further objection, that, until recently, by the Mandamus Act (y), there could have been no appeal from the decision of this court.

Mr. Justice COLERIDGE. Can a person, not admitted to be a party to a cause, appeal against the judgment?

The *Attorney General*. Clearly, in the ecclesiastical courts. I have made the inquiry of a learned friend; and there are many

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The Attorney General's argument.

No mandamus *quia timet*.

Where judgment has been given, the remedy is by appeal.

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General's argu-
ment.*

cases now pending of that description. Again, in the admiralty courts, in a question of prize, could any one say, that if a certain claim were rejected, this court would try a question of law, which, to this court, is foreign law, to be gathered from books of authority, of which the court knows nothing? Could they, by mandamus, enter into that question? Clearly not. Take a much more familiar case,—of commissioners acting under a commission of the court of exchequer, in the condemnation of goods. Case after case has occurred upon the subject, where goods have been condemned improperly. The condemnation is a judgment *in rem*, binding upon the whole world. Could this court interfere by a mandamus? It would be usurping the revenue prerogative of the exchequer in these matters. Again, take the case of escheats. All these are judgments conclusive within the jurisdiction of the particular courts. I do not see, my lords, any distinction between this case, and the ordinary case I am about to mention. Supposing the vice-chancellor were to decide that a certain person—I will take the great case (z) which my learned friend Sir *Fitzroy Kelly* so industriously and so successfully argued, some months past, between the railways, in which the question was, whether certain proper parties were before the court, whether it ought to be the directors or certain shareholders—would this court grant a mandamus to make the vice-chancellor hear the shareholders? It is the same thing. They would go to the lord chancellor, by appeal and say, we are the proper parties to be heard. Here it is precisely the same question. It is the case of a court of co-ordinate jurisdiction, acting within the limit of its own authority. If this is a court, it acts within its own proper jurisdiction. It has decided it will not hear these parties; and, in that which is a matter of law or a matter of practice, how is this court to decide? Where are they to gather their authorities from? Will you tell me whether *Ferraris*, who founds his doctrine upon the third council of *Lateran*, under Pope Innocent the Third, which has never been recognized in this country, is good or bad? I have been poring my eyes out, with the assistance of my learned friend, upon these books, for some days past; and I am not able to say what is authority, and what is not. Are your lordships to interfere with the decision of a judge who is familiar with the subject, upon a point of law which is founded upon the practice of his own court? In such a case are your lordships to decide against him? If this be a court, the appeal lies to the privy council. If they are acting as commissioners, the appeal lies to the dean of the arches. I apprehend, therefore, upon these familiar grounds, of this being (so far as this court is concerned) no question of temporal interest, there being a concurrent jurisdiction, and there being no inquisitorial power, and that these parties have acted within their jurisdiction, that this court cannot interfere.

*The power of
inquiry con-
tended for, is
taken from the
Archbishop.*

Supposing it is no court, there is a greater difficulty still. There can be no mandamus; for the matter cannot be tried: it is a matter which is taken from their jurisdiction. I am now about to consider the effect of what these jurists say upon this subject. The old

(z) *Mozley v. Alston*, 11 Jur. 315.

authorities, the jurists, say, the Archbishop may inquire into *processum electionis*. The act says he shall not, for the election is good to all intents and purposes. The jurists say, he shall inquire into *personam electi*. What is the meaning of *personam*? Does it mean everything Lancelottus speaks of? Does it mean the party's age? Whether he has been married twice? Does it mean whether he was born in lawful wedlock? Whether his body is free from infirmity? If he has solicited the preferment himself? Does it mean all that? It cannot mean that. It is not pretended, upon the old jurists, that it does mean that. But if it does mean all that, what was the process before the act of parliament? 'They sent out a postulate to the Pope, and the Pope dispensed with it. A bull from the Pope, after consideration by the Pope, made all the difference; and the postulation was accorded, and the Pope dispensed with these qualifications. By the statute of Hen. 8, again set up by the statute of Elizabeth, which acts upon the principle of the pre-eminence of the crown, the crown stands in the place of the Pope. Can the crown, by its authority, do what the Pope could by his postulate? Clearly it can. They have no right, therefore, to enter into those matters, which would be dispensed with by the postulate, and which have been dispensed with by the crown. If it means identity, they are stopped by that upon which they found their right to appear. *Ferraris* says, it means these things, and so says *Van Espen*. "*In personâ electi, videlicet, ætas legitima, morum honestas, et literatura sufficiens*(a)." That is all that this jurist says ought to be inquired into. So says *Van Espen*. *Lancelottus* says a great deal more: *ætas legitima*,—that might have been dispensed with under the postulate: it is so expressly stated(b). "*Morum honestas*"—so as to that. "*Literatura sufficiens*"—what is that? Does it mean that clerical qualification which had reference to capital punishment? Does it mean *doctrina*? Who can say? Does it mean anything; or are the matters respecting the *persona* which are stated by the jurists, anything more than the question of identity? Or is this which is taken from the non-authoritative council of *Lateran* to be the test? If it mean either of those, nobody can say that the Pope, upon a postulate, might not have dispensed with them all. Then why should not the crown? I will take it in the largest sense; I will say that it means, in the old canonical law, doctrine; still this particular court has no power of inquiry; I mean the court below. The objections pointed out in the affidavit are objections to doctrine condemned, I should have thought, years ago. By act of parliament, every court must proceed according to its peculiar province and jurisdiction. I will assume, (it is not so in this case; but it is a supposable case) that the charge had been a temporal offence. Could the court, or the commissioners of the archbishop, have tried it. Assuming a charge to be made against a gentleman named to be a bishop, that when he was at school, or at college, he had committed an act triable by the criminal law of this realm;

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The Attorney General's argument.

Meaning of *persona*, according to the canonists.

(a) *Supra*, p. 150, n. *Van Espen*, p. 99, Louvain, 1753.)
Jus Eccles. Univ. pars 1, tit. 14, (b) *Lancelottus*, *Inst. Jur. Canon.*,
De confirm. Episcop. c. 2, s. 5 (vol. 1, lib. 1, tit. 8. Vide *supra*, p. 128, n. (s.)

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ment.
Church Disci-
pline Act.

could the court enter into it? Certainly not. At the most, an objection *in personam* must be taken, with reference to the jurisdiction of the court. The court has no power to try a mere temporal question. I will take this as a matter of doctrine. The Legislature has then provided for this particular case. The Church Discipline Act, which is 3 & 4 Vict. c. 86 (c), by sections 11, 20, and 23, provides in substance this: that, in all matters of doctrine,

(c) The 3rd section of the stat. 3 & 4 Vict. c. 86, enacts, "that in every case of any clerk in holy orders of the united Church of England and Ireland who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such a charge or report: provided always that notice of the intention to issue such commission under the hand of the bishop, containing an intimation of the nature of the offence, together with the names, addition, and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the bishop to the party accused fourteen days at least before such commission shall issue."

Sects. 4 and 5 regulate the proceedings of the commissioners, and the report to be made by them to the bishop; who, by sect. 6, is empowered to pronounce sentence, by consent of the accuser and the accused, without further proceedings. Sect. 7 enacts, that if the commissioners shall report that there is sufficient *prima facie* ground for instituting proceedings, and if the bishop, or the party complaining, shall thereupon think fit to proceed against the accused, articles shall be drawn up and filed, of which (by sect. 8), a copy shall be served upon the accused. By sect. 9, the bishop may require the party accused to appear before him to answer the articles; and if the accused shall admit the truth of the articles, the bishop or his commissary shall forthwith proceed to pronounce sentence thereupon.

Sections 11, 20, and 23, cited above by the Attorney General, are as follows:—

XI. "And be it enacted, that if the party accused shall refuse or neglect to appear and make answer to the said articles, or shall appear and make any answer to the said articles other than an unqualified admission of the truth thereof, the bishop shall then proceed to hear the cause, with the assistance of three assessors, to be nominated by the bishop, one of whom shall be an advocate who shall have practised not less than five years in the court of the archbishop of the province, or a serjeant-at-law, or a barrister of not less than seven years standing, and another shall be dean of his cathedral church, or one of his cathedral churches, or one of his archdeacons, or his chancellor; and upon the hearing of such cause the bishop shall determine the same, and pronounce sentence thereupon according to ecclesiastical law."

XX. "And be it enacted, that every suit or proceeding against any such clerk in holy orders for any offence against the laws ecclesiastical shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards; provided always, that whenever any such suit or proceeding shall be brought in respect of an offence for which a conviction shall have been obtained in any court of common law, such suit or proceeding may be brought against the person convicted at any time within six calendar months after such conviction, although more than two years shall have elapsed since the commission of the offence in respect of which such suit or proceeding shall be so brought."

XXIII. "And be it enacted, that no criminal suit or proceeding against a clerk in holy orders of the united Church of England and Ireland for any offence against the laws ecclesiastical shall be instituted in any ecclesiastical court, otherwise than is hereinbefore enacted or provided."

the proceeding is a criminal proceeding; it is to be conducted by letters of request to the bishop in whose diocese the party offending is; the bishop is to set the prosecutor in motion; articles (which are essentially a criminal proceeding in the ecclesiastical courts) are to be exhibited against the party—

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The Attorney General's argument.

Mr. Justice COLERIDGE. Is there not a distinction between trying an offence, for the purpose of punishing it directly; and trying it merely for the purpose of ascertaining the fitness of the party for some office, that is, ascertaining the fact solely? Of course, this ecclesiastical court could not try a criminal offence. That is quite obvious. I am not upon the general argument, whether they can inquire at all; but you put it merely upon the unfitness of the court to enter into proofs.

The *Attorney General*. I apprehend certainly they cannot enter into the inquiry, for this reason. Assume, if you will, the most heinous charge. A person comes before the court, and says, I charge this party with this offence. In the first place, the bishop elect is not bound to be there; for, all along, this matter has proceeded upon a mistake. It is the proctor of the dean and chapter who is the promovent in the whole matter. It is he who is bound to offer, and who does offer the petition of the bishop. The bishop does not appear by anybody, except simply to take the oaths on confirmation. That is the first objection. The next is this: If this be not a court, there is an end of the argument; but if it be a court, then that will raise the point. Assume a charge to be made against any person, of a most heinous kind. The court has no power to summon witnesses, no mode of giving the party charged the least chance of refutation. And so to the charge, which may have been circulated by malice, the defence is disarmed, by the impotence of the court.

The bishop elect not bound to be present at his confirmation.

The Archbishop's court incapable of affording a fair trial.

Lord DENMAN. Here is no notice to him of any charge.

The *Attorney General*. None whatever. And yet, *ad statim*, he is to appear and answer to the charge. The court has no power of compelling any witnesses to appear. But if it is a charge of heresy, (I will take the strongest case), what is to be done? Apply to the bishop of the diocese: have the matter investigated. There the party may have an opportunity of being heard. But here, there is no mode of summoning witnesses, nor of making any inquiry. Is the archbishop to proceed upon the idle, foolish, inconsiderate tattle of people, who blindly take up a cry, because it is easier to do so, than to investigate the subject? It reminds one almost of a celebrated trial we have heard of; of Faithful, where we read, "And first, among themselves, Mr. Blindman, the foreman, said, I see clearly that this man is an heretic" (*d*). How is the matter to be investigated? Here is no tribunal to try it; no mode of getting evidence; no notice; no opponent parties, because the contest here is between the party who appears to challenge, and the dean and chapter, who have, in the performance of their duty, to present the party, as they do, judicially. The bishop has no right to appear: all he has to do is, upon his confirmation, to take the oath. I

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Canterbury.

The Attorney
General's ar-
gument.

The confirma-
tion, being
complete, can-
not now be set
aside, or treated
as a nullity.

Parallel case,
of a writ of
*melius inqui-
rendum*.

apprehend, therefore, upon that ground likewise, that the fact of these parties having proceeded in a criminal form, by articles, or offered to proceed upon that ground, carried conviction to the mind of the learned judge, who was assisting upon the occasion, that that is alone sufficient ground for resisting the application, and that, even if everything were against the party, the Court would not make the rule absolute.

My lords, there is another objection. Assuming that I am wrong in every one of these matters, what is to be done? The bishop has been confirmed. He stands confirmed. The affidavit shows the solemn judgment of the court confirming him. The judgment is set out at length, following the form, reciting the citations, mentioning the contumacy, and solemnly confirming and investing Dr. Hampden, who is now as much Bishop of Hereford, as he can be by law; and if they go on from the present hour to the end of time, he will not be less a bishop.

Take some familiar cases. An application is made to your lordships for a writ of *melius inquirendum*. What is the first step to take? To bring up the judgment and quash it; because, standing that judgment, the court has no power. There never was an instance known of a *melius inquirendum*, which is an old prerogative writ, going to the coroner or an escheator, without bringing up the former inquiry and quashing it, and so having the thing set right. Numberless instances may be mentioned to your lordships. Parties have refused to be examined, or have been examined imperfectly. Fresh evidence comes before the coroner. He applies for a *melius inquirendum*, and a writ to disinter the body; which is done. You bring up the former inquisition, and quash it. So with an escheator. Suppose an escheator finds any matter, what can be done? He cannot tack a new judgment upon a former finding, and have the two records traversable in this court upon different interests which are inconsistent. The matter is found: the matter is determined. If it be wrong, an appeal will lie; but this Court cannot interfere.

Assume that the court make this rule absolute. Take it for granted, for the purpose of the argument, that the charge is a charge which can be substantiated against the gentleman on whose behalf I appear. Assume the whole of it. Take it as strongly as you please against us. The inquiry takes place; and the archbishop is satisfied that he has committed a temporal offence, or anything disqualifying him. What is to be done? Is the judgment to be set aside? The archbishop cannot set it aside. He is *functus officio*. He has discharged his duty. The letters patent which set him in motion are at an end: he has no authority. What then is to be done? Nothing: because even the canon law does not allow any inquiry after confirmation. Even canonically, under the old form, the archbishop could not institute any inquiry between confirmation and consecration. The confirmation is perfect. The election is made binding to all intents and purposes. Consecration is only ministerial; and he is bound to perform it, or else, if he does not, somebody else may. Therefore there is no means, as it seems to me, by which, if the thing were done, there could be any utility or any result whatever from allowing inquiry. And I need not

remind your lordships, that you will see some practical end to the case, before you will interpose, by a prerogative writ of this description, to do an act which will be so injurious, as undoubtedly this will be, to the gentleman, not for whom I appear, because I appear for his superiors, but on whose behalf I am appearing.

But independently of these matters, there is that which, but for the importance of the case, and the respect I owe the court, I should have begun with, namely, a formal and technical objection to the maintenance of a writ of mandamus at all in this case. I ask my learned friend—and, but for the solemnity and interest of the case, I am sure your lordships would, in the commencement, have asked my learned friend—for a precedent of an application of this description. None such can be found. The industry of my learned friends has found none. With all the anxiety of myself and my learned friends who assist me, we have searched in vain for such a precedent. There is none. I believe the general rule is this, that there is no case in which a mandamus will lie, except it be for or involve a temporal injury. The first and most leading case upon that subject, without troubling your lordships with it at greater length than I can help, is the case of *The King v. St. Peter's, Thetford*, reported in the 5th vol. of *Term Reports*, p. 364. That was an application for a mandamus for a church rate. There was nothing more than the ecclesiastical duty to provide for the maintenance of the church; and upon that ground it was refused. The courts say, this is a matter of ecclesiastical cognizance, and we will not interfere. Your lordships will find more recent cases even than that. There is one in 8 *Adolphus and Ellis(e)*, *The King v. St. Margaret's, Leicester*. There the court granted the mandamus, but upon this express ground, that the local act, regulating the parish, required and prescribed that the church rate should be made; and the court said: here is a temporal question: true, it is ecclesiastical for some purposes; but here it is temporal, for the act imposes a duty which may be enforced by indictment, but it gives no pecuniary remedy for the maintenance of the church. It is clear, that that exception proves the rule, and fortifies my objection, because the courts have always looked at the temporal interest, for the purpose of seeing whether they will interfere. In what respect is this a temporal interest? The whole of this question depends upon a pure and simple point of canon law. My learned friend says in his statement, that the canon law is part of the common law of this land. Granted, with a qualification, but with a qualification only. It is not part of the common law in so far as this court is concerned. The ecclesiastical courts, and the revenue courts, and the chancery courts, were all carved out of one general system. Originally, the bishop sat in the same court with the viscount, and administered the ecclesiastical law whilst the temporal law was administered by the viscount. The common law, as it is applied in our courts, all branch from one origin, each court taking its own peculiar law. The revenue law, the course of the exchequer, is part of the common law of this country; but it is not recognized in this court.

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The Attorney General's argument.

No precedent of an application of this description.

Rex v. St. Peter's, Thetford.

Rex v. St. Margaret's, Leicester.

In what sense the canon law is part of the common law.

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The Attorney General's argument.

No parallel between the Archbishop's court, and a court of magistrates.

Reg. v. Justices of Kesteven; and *Reg. v. Justices of Carnarvonshire*.

So, the canon law is part of the common law; but the canon law is as much foreign to this court, requiring to be proved by affidavit or evidence, as any other foreign law. I apprehend if your lordship had here to try a question before a jury, involving the rights of parties to appear before an ecclesiastical tribunal upon probate, or administration, or jactitation of marriage, or restitution of conjugal rights, your lordship could not lay down, from your own breast, the law to the jury by which they were to be governed: you would have my learned friend Dr. *Addams*, or Dr. *Bayford*, or Dr. *Twiss*, gentlemen of high authority, in the witness box, to swear to the law, which having ascertained from them your lordship would apply to the case before you, and so point it out to the jury. You could not search the books, and judge what was the canon law: it is a matter altogether alien from and foreign to the jurisdiction of this court, which the court cannot act upon. There is no temporal right, which the court can deal with and say, here our jurisdiction can attach. The canon law is to be governed by and deduced from the jurists; for which, I say with great respect, in the contemplation of the law, this court is incompetent.

But I beg your lordships' attention to a rule, which seems pretty generally understood in this court, and as governing this matter likewise. I mean the decision in the case of *The Queen v. The Justices of Kesteven*, 3 Q. B. Rep. 810. The rule, with respect to magistrates, used formerly to be this: that if they had mistaken the law in their decision, this court would grant a mandamus, because it reviewed the decisions of the magistrates, and set them right in the law by mandamus, and the court therefore interfered. I am sorry to say I was possibly the means of leading it originally into error by the inadequate way in which I argued the case (f). The court said, upon reconsideration (g), they believed they were in error; that wherever a court, professing to act upon a matter in its jurisdiction, has acted wrongly, if it chooses, it may state a case, and this court will set it right (which is equivalent, in the present case, to an appeal to the privy council, or the dean of the arches); but if the inferior court does not state a case, having decided the matter, this court will not interfere. That is laid down in the *Queen v. Kesteven*. How does that differ from this case? My learned friend compared the ecclesiastical court to the court of magistrates. It has no similarity; for from a court of magistrates there is no appeal, as of right. This court cannot, by any mode of proceeding, get from the magistrates all their proceedings to appeal from, as a right. If an order is brought up by certiorari, the order, and nothing else, appears; and the order may be good though the ground upon which the magistrates proceeded to adjudicate, has been clearly from the commencement wrong. If the magistrates choose to state a case, they can do so. It is no infirmity in their jurisdiction, that this court, having the superintending control over a court essentially and emphatically under its control, and emanating from it, namely, the criminal administration by justices, will do by mandamus what it

(f) Of the *Queen v. The Justices of Carnarvonshire*, 2 Q. B. Rep. 325, in which Sir J. Jervis had been counsel.

(g) In the *Queen v. The Justices of Kesteven*.

will do towards no other court,—point out to them their practice and their law. And this court did it to a much larger extent than now it would be inclined to do, if I draw the right deduction from the case of the *Queen v. Kesteven*. That is not so, with the court here. If the ecclesiastical judges are wrong in their proceedings, the court above will find out every thing, because every thing goes up to the privy council. Every redress can be obtained, in this case, by appeal. It is not so with the magistrates. Unless they choose to state a case, embodying every thing, there is no mode of reviewing by appeal all the proceedings of the court of justices.

But, my lords, I apprehend that the penalty which is affixed to the act of the archbishop, if he refuse, is again another most decisive objection in this case, the penalty of *præmunire*. It is as familiar as the first principles one learns in going into a pleader's office, that the court will not interfere to make magistrates do acts which may subject them even to an action. I need not weary your lordships by citing the authorities; they are collected in *Archbold's Justice of the Peace*, vol. 2, p. 161 (*h*). Here if the archbishop delay beyond twenty days, he is subject to a *præmunire*, and the act of parliament which was passed to save the justices from the peril of actions, when acting under your lordships' peremptory orders, will be no protection to the archbishop. Your lordships know, that by the statute of 6 & 7 Vict. c. 67, s. 3, it is enacted, that no action shall be brought, or other proceeding had against a magistrate for any thing done in obedience to a peremptory mandamus. I will take for granted that your lordships make this rule absolute. The archbishop proceeds to hear the articles, if he can revive the queen's letters patent, (which he cannot do), and if it is thought desirable that he should do that which can lead to no good. These gentlemen appear and exhibit their articles; and a day being named, (not *ad statim*, as says *Gibson*), the bishop appears, and puts in his answer to these articles. There is a plea, a replication, a discussion. My learned friend, Dr. *Addams*, and others appear; and with the greatest expedition, the case is not over in twenty days. What is to happen? The archbishop does not confirm: it is my painful duty to inform him that he is within the dangers of *præmunire*. Does the act protect him? No; your lordships did not command him not to confirm, but commanded him to hear, and he obeyed your command. The act says, if you do not confirm, my lord archbishop, you shall be in the penalties of *præmunire*. What is to happen? The act is no defence. It is a case unprovided for, and therefore within the old rule that this court will not, even though the case be clear, issue a mandamus to a justice to do that which may subject him to an action. And surely, in this case, where my learned friends, I know, must have searched, and, if so, must have searched in vain, for any case where there has been any objection made to the confirmation of a bishop, though we know, that in recent times, objections have been felt against such confirmations,—surely, if my learned friend has searched in vain to find such a case; if he can point out no case of any application in

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The penalty of *præmunire* for delaying to confirm, is an objection against issuing the mandamus.

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gument.

the slightest degree like the present, in a matter which is not temporal, where the penalties are such, and where there is no escape from them; that will be, *in limine*, an objection which will be strong with your lordships, against granting the writ of the queen to interfere with the prerogative of the queen, and by the queen's writ requiring the archbishop, in defiance of the queen's command, to do that which the law would not authorize him to do.

I fear, my lords, I have been too long upon this matter. I know I have not adequately presented all the points to your lordships; but I am to be followed by several of my learned friends, whose time and industry will present them more effectively than I can. I trust I have done enough to point out the general objections, and to satisfy your lordships, appearing here as I do with the sanction of his Grace the Archbishop of Canterbury, that this rule, which is directed to him, ought not to be made absolute.

Ex parte
Smyth.

Will your lordships forgive me for mentioning, upon the last point only, a case of *Ex parte Smyth*, in 3 *Ad. & Ell.* p. 719, in which Mr. Justice *Littledale's* judgment is this: "Whether they are right in so decreeing or not, is a question of practice not of jurisdiction. The temporal courts cannot take notice of the practice of the ecclesiastical courts, or entertain a question whether, in any particular cause admitted to be of ecclesiastical cognizance, the practice has been regular."

The Solicitor
General's ar-
gument.

The *Solicitor General*. My lords, I should be well content to leave this question where it stands, after the argument of my learned colleague: for reviewing all which has fallen from him, I am at a loss to remember any thing which he has omitted, or almost any point of learning which he has failed to bring before the court. And yet, my lords, I hope to be pardoned, if I offer myself for a few minutes in defence of a great principle, now in jeopardy, and in maintenance of a prerogative among the first and foremost in importance of the prerogatives of the crown. For, my lords, if your lordships set to your seal, that the opposers in this case have ground to stand upon, why then, I say, there is no longer peace for the established Protestant church of this realm; the door is opened for every sort of attempt upon the prerogative in the appointment of our bishops; nor will there be the appointment of a bishop from this time forward, that will not be subject to some impertinent inquiry or other.

If inquiry
allowed, no
peace in the
church.

My lords, "such is the variety of the apprehensions, the humours, and the interests of men in this world" (*i*), that, if every man who supposes himself to have an interest, is to come before the confirming archbishop, and to be heard, as an opposer, upon questions touching the moral qualities of the bishop elect, his habits of life from early youth, his doctrine, any thing that restlessness or peevishness can suggest; who can say where it will end?

No precedent
for the right
claimed.

My lords, if there were precedent for the interference which these gentlemen claim as of right, if, during the three hundred years and more that have passed since the statute of Hen. 8, there could be

found authority for saying that such interference has even been successful, then this question might admit of some difficulty. But, my lords, I cannot help thinking, that the very fact of there being no precedent of the kind; nothing of the sort ever done; no author of any quality or degree having been cited to show that such a thing is even supposed to have been done; my lords, in the absence of these things, I say that we ought to be strong upon the statute, and that the queen's prerogative ought not at this time of day to be disturbed.

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gument.

My lords, what are the precedents? Sir *Fitzroy Kelly*, in moving for the rule, put in the front and forehead of his battle, the case of Dr. Mountague. Has any man doubted for a moment that the case of Dr. Mountague is no authority at all? Said Sir *Fitzroy Kelly*, Dr. Mountague's case, as reported in the books, is an authority, because it was not in the troubled times of England. The troubled times of England had not commenced in 1628, said my learned friend: it was long after that, said he, that the troubled times of England commenced, when judges might have been afraid to do their duty. My lords, the judges were not always afraid to do their duty in troubled times. But if there was a time in the history of England, 1628 is as good a time of trouble as need be referred to in English history. My lords, that was the 3rd of Charles the First. He had broken with two parliaments, and had turned two parliaments to the right about. That was the year of the solemn remonstrance and Petition of Right. That was the year in which effective measures were taken by some of the best and most gallant men in England, to stand by what they thought the liberties of the people and their own rights, against the encroachment of the crown. My lords, that was the year when this very Dr. Mountague, (who had been, as my learned colleague stated to your lordships, "before the house on former occasions;" against whom resolutions of the house had been taken and passed, stating him to be "a person given over to popish things,")—that was the very year in which Dr. Mountague, having been appointed to a bishoprick, was, therefore, the great cause of quarrel between the king and the house of commons.

Mountague's
case.

Will your lordships allow me to refer shortly to the parliamentary history⁽ⁱ⁾ of the year 1628? "Jones the printer and his counsel were called in, to argue the business of Dr. Mountague's episcopal confirmation." I would have your lordships observe that Jones the printer was not the only person who took share in that opposition. Jones the printer was accompanied by a person of the name of Humphreys, afterwards a parliamentary colonel^(j); and this printer, who lived in the city, and this parliamentary colonel thought themselves justified, as interested in the question, to go into Bow Church before the archbishop, and oppose the confirmation. "Jones the printer and his counsel were called in, to argue the business of Dr. Mountague's episcopal confirmation. The questions were two: 1. Whether the exceptions be legal? 2. Whether the confir-

(i) 2 Cobbett's Parl. Hist. 461.

(j) *Supra*, p. 54.

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gument.

mation be good? The last of these is the point touching which the house enjoined the counsel to speak. The counsel proposed a third question, What would be the fruit and effect thereof, if in law the confirmation should prove void? In which the counsel said, it would not extend to make him no bishop upon the point of election, but upon the point of confirmation only, which makes him punishable, if he execute any thing concerning the bishoprick. Sir Henry Martin said," (he was a civilian of the time)—"Sir Henry Martin said, That the exception, making void the confirmation, doth in law work also upon the election, and likewise make that void. Dr. Stewart said, The point of setting to the advocate's hand is but a matter of form of court, but no matter of law. Sir Henry Martin said, He would endeavour to give the house full satisfaction; and will speak with relation to the king's right, and laws of the realm." Now Sir Henry Martin misstates the law; for he says, "The proclamation at common law should not be at Bow Church, but at the cathedral church of the diocese where the bishop is to be elected, and the dean and chapter and clergy of the diocese are to except, and not every one that will. The arguments that might fall thereupon are endless, and to alter a course so long settled needless; and I conceive it is plain that the king and the law have the power to deprive him of his bishoprick, if he deserve the same: therefore it were good to decline this dispute at present."

Upon referring to the report of that case in *Burn's Ecclesiastical Law*, there is appended a note, which does not come, I believe, either from *Collier*, or from *Fuller's Church History*, where the story is first mentioned, and from whence evidently it has been taken by *Collier*. *Fuller's Church History* was about 1655 (*k*), and *Collier's History* in 1714 (*l*). "It hath been observed"—says Dr. *Burn*—"that Dr. Rives, a most eminent civilian and canonist, admitted that the opposition was good and valid, had it been legally offered; and that the parliament of that time proceeded upon the same opinion" (*m*).

I dare say your lordships would very little care what the parliament proceeded upon as right in their opinion. What right they had to interfere in the matter at all, is not for a moment to be considered in this place; but I should like to know to whom it had "been observed." It is not stated to whom the observation was made. It is not said at what time *it was observed*; neither is it said whether it was Dr. Rives himself who made the observation. But it was suggested, in the place below, by Dr. Lushington (*n*), that Dr. Rives, for all his being so famous a civilian, might not have had the strength of mind at that time to speak the truth, when he said, that, if the articles had been duly entered, they would have been sufficient for the opposers to rely upon. It might have been, that he cowered to parliament. And, indeed, if you examine into the character of Dr. Rives, which is now matter of history, you will find that he was

(*k*) It was published in 1656.

(*m*) 1 Burn. E. L. 207.

(*l*) The first vol. was published in 1708, and the second in 1714.

(*n*) *Supra*, p. 61.

not likely to stand up in heavy weather; for I will show you, my lords, on the authority of Archbishop Usher, that Dr. Rives was a person whose integrity was not to be relied on. I find, upon referring to a collection of Archbishop Usher's Letters by his chaplain, Dr. Parr, at page 336, a letter written in 1625 to Archbishop Williams (then Lord Keeper), and the Lord High Treasurer, a letter quite full of Dr. Rives. The passage to which I draw your lordships' attention is this. "Your lordships," says Archbishop Usher, "had need to watch this man's fingers, whenever you trust him with drawing up of any orders or letters that do concern his own particular: for otherwise you may chance to find him as nimble in putting tricks upon yourselves, for his own advantage, as now he is in putting them upon me."

But the other precedent which was cited by my learned friend, of Matthew Parker, the first protestant archbishop of England, cannot for a moment stand. Strype called him the first protestant archbishop of England, because there were some doubts about Cranmer being a person who could be taken by all men in that sense. With respect to Cranmer, it was, to be sure, at one time, *divisum imperium* between the duty he owed his prince, and the duty he held to Rome. There are unhappily blots upon the man; but I say here, that he redeemed them, who had at last the constancy of heart to die for his principles. This case of Matthew Parker was the case of the Nag's Head consecration; and it is observable that two commissions went forth to confirm the lord archbishop, addressed to certain persons whom my learned friend supposes (*o*) to have absolutely refused to act under the commission. But Strype suggests another consideration, which I think not very unlikely, that there was no *quorum* clause in the commission under which they thought it lawful to act; and accordingly another commission was made out (*p*). There was no acting at all under the former commission. There can be no pretence for saying that at Bow Church any kind of opposition was tendered to Cranmer's confirmation. When, under the second commission, the act was done, there was no opposition, nor anything like opposition. It is worth mentioning, in reference to that case, that the archbishop was not confirmed in person, but by proxy; and, as an argument in favour of his consecration, Bishop Bramhall puts this reason, that though a man may be confirmed by proxy, he cannot so take any sacrament of the church, except matrimony, by the canon law. "Præter matrimonium," no sacrament of the church can be taken, except in person (*q*).

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The Solicitor General's argument.

Character of Dr. Rives, as given by Archbishop Usher.

Comment upon the precedent of Archbishop Parker.

(*o*) *Supra*, p. 144.

(*p*) Strype's Life of Parker, Book 2, ch. 1. The words of the clause, omitted in the first commission, are, "*aut ad minus quatuor vestrum.*" Vide *supra*, p. 59, n.

(*q*) "Archbishop Parker was not personally present at his confirmation in Bow's Church, or at his confirmation

dinner at the Nag's Head, which gave the occasion to this merry legend, but was confirmed by his proctor, Nicholas Bullingham, Doctor in the Laws, upon the ninth of December, anno 1559. A man may be confirmed by proxy, but no man can be ordained by proxy. It is a ruled case in their own law, "*Non licet Sacramentum aliquod præter ma-*

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ment.

The precedent
of Bishop
Mountague
not cited by
writers on
ecclesiastical
law.

Danger of
factious oppo-
sition.
Bishop of
Manchester's
case.

Mr. Justice COLERIDGE. That question of Parker's consecration is very fully argued in *Courayer* (r); and I think the only difference I observed is this, that it is there stated that opposers were waited for a competent time.

The *Solicitor General*. It is not stated in *Bramhall's* book.

Mr. Justice COLERIDGE. You call it the Nag's Head Consecration. He put an end to the Nag's Head story, you know.

The *Solicitor General*. The rule of the canon law is, "Non licet sacramentum aliquod, præter matrimonium, absenti administrare."

Before the publication of *Godolphin's* book on ecclesiastical law (s), and before the publication of the first edition of *Gibson's Codex* (t), the case of Dr. Mountague certainly had occurred. It is not, however, mentioned by either of them. It is not mentioned by *Ayliffe* (u). It is not mentioned, that I can find, in any book of ecclesiastical law, as a subsisting precedent, or even as notice of a precedent; and therefore, my lords, I take leave to say that of Dr. Mountague's precedent is of no authority. I must submit to your lordships, that it is not worth any further consideration.

But my lords, let us come down into more modern history. Sorry am I to say, that within this very year there is another precedent to be found in the case of the present Lord Bishop of Manchester (v). And your lordships see, when once it gets abroad, that men can interfere at the time of confirmation, there will not be wanting persons, whether they be clergymen of the church of England, or others, who think they are doing God service by coming forward upon such occasions and claiming their right to oppose upon any ground that suggests itself either in respect of the life of the bishop elect, or his doctrine. I speak of Mr. Gutteridge's opposition. My lords, if there were persons like Mr. Gutteridge to come there and put articles into form, I should like to know, upon the same argument as my learned friends are pressing against the Bishop of Hereford, what answer could be made to them? Mr. Gutteridge would have a right, had he put his articles into form, and come there with them properly signed and written, to have a trial of that plea; and I venture to ask, whether it would not be a scandal and a disgrace to the church, and a great interference with the prerogative of the crown, if such men could come upon such occasions, and oppose the person deemed competent by the crown to be a bishop. There is no authority whatever to show that confirmation at Bow Church has ever been an occasion when a man could come and except to the act which the archbishop is then called on to perform.

One of your lordships said, that the present opposers were clergy-

trimonium absenti administrare." So if there was an attempt to consecrate any man at the Nag's Head, it must be Dr. Bullingham, it could not be Archbishop Parker."—*Bramhall's Works*, vol. 3, p. 43 (Oxf. 1844), Part 1, Disc. 5.

(r) "Defence of the validity of

English Ordination."

(s) *Repertorium Canonicum*; published in 1678.

(t) In 1713.

(u) *Parergon Juris Canonici Anglicani*; published in 1726.

(v) *Supra*, p. 46.

men in the diocese of Hereford, who had an interest in this case; and my learned friend, Sir *Fitzroy Kelly*, in moving for the rule, suggested that one of those gentlemen, or any deacon of the diocese of Hereford, of pure religion, might hereafter have to come under a bishop who, though not of pure religion, had been confirmed, and that he might have to apply for priest's orders to a bishop, of an entirely different way of thinking from himself (*w*). My lords, those are inconveniences perhaps; but they are inconveniences of such sort, as the church of England for three hundred years has been content, and I hope, if this system of election and of confirmation continues, will for ever be content to put up with; and, on this point I will call your lordships' attention to a passage in *Hooker*, to show the view which that judicious person takes of such compromise. *Hooker*, in book 8, c. 7, s. 3, says, "That difference, which is between the form of electing bishops at this day with us, and that which was usual in former ages, riseth from the ground of that right which the kings of this land do claim in furnishing the place where bishops, elected and consecrated, are to reside as bishops. For as considering, the huge charges which the ancient famous princes of this land have been at, as well in erecting episcopal sees, as also in endowing them with ample possessions sure of their religious magnificence and bounty we cannot think but to have been most deservedly honoured with those royal prerogatives, [of taking] the benefit which groweth out of them in their vacancy, and of advancing alone unto such dignities what persons they judge most fit for the same. A thing over and besides even therefore the more reasonable; for that, as the king most justly hath pre-eminence to make lords temporal which are not such by right of birth, so the like pre-eminence of bestowing where pleaseth him the honour of spiritual nobility also, cannot seem hard, bishops being peers of the realm and by law itself so reckoned. Now, whether we grant so much unto kings in this respect, or in the former consideration whereupon the laws have annexed it unto the crown, it must of necessity being granted, both make void whatsoever interest the people aforetime hath had towards the choice of their own bishop, and also restrain the very act of canonical election usually made by the dean and chapter; as with us in such sort it doth, that they neither can proceed in any election till leave be granted, nor elect any person but that is named unto them. If they might do the one, it might be in them to defeat the king of his profits; if the other, then were the king's pre-eminences of granting those dignities nothing."—(There is no qualification here upon the prerogative.)—"And therefore, were it not for certain canons requiring canonical election to be before consecration, I see no cause but that the king's letters patents alone might suffice well enough to that purpose, as by law they do in case those electors should happen not to satisfy the king's pleasure." My lords, every man wishes at this moment that there were no such thing, that there were nothing but the letters patent to proceed upon. I believe it would give great contentment; while, on the other hand, if your lordships hold that

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*The rights of
the Pope
transferred to
the crown, by
stat. 25 Hen. 8,
c. 20.*

*The preroga-
tive of the
crown, in the
appointment
of bishops,
traced back.*

*25 Edw. 3,
stat. 6.*

this can be done again and again, I say once more, the peace of the church of England is for ever disturbed. "I see no cause," says he, "but that the king's letters patents alone might suffice well enough to that purpose, as by law they do in case those electors should happen not to satisfy the king's pleasure. Their election is now but a matter of form: it is the king's mere grant which placeth, and the bishop's consecration which maketh, bishops." There is no mention whatever there of confirmation: he says, "It is the king's mere grant which placeth, and the bishop's consecration which maketh, bishops" (*w*).

My lords, I mean, in the few observations I am about to address to the court, to come by degrees to the statute of Hen. 8, and to see what led to that statute; the state of things at the time; what has happened since that time; and how far the circumstances show that what the Pope was, the king became, and whatever pre-eminence the Pope had in England, the king acquired, by the statute of king Hen. 8. And, my lords, not that only; but if there was anything in the papal power and pre-eminence inconsistent with the laws and privileges of this land, that, the Pope being rejected, the crown of England chose for itself to do without.

My lords, I think I shall show you that the full right of confirmation was in the Pope; and if the Pope had power to do those things which the canon says it was his prerogative to do without restraint, then the prerogative of the crown shall not be intercepted, if it works under the statute; this, which is now sought for by the opponents, would in truth be an interception of the queen's prerogative.

My lords, my learned friend led your lordships to the early history of this matter, I think beyond the time of king John (*x*). I shall call your lordships' attention to the mode of election of bishops, first of all, by the statute of 25 Edw. 3, st. 6, a statute which passed in 1350, reciting the statute which passed in 1307 in the reign of Edw. 1 (*y*). And my lords, the recital of that statute refers, in the first place, to the causes why kings and noblemen did give lands to bishops and other prelates; how the Pope bestowed spiritual livings upon aliens not dwelling in England; what inconveniences arose therefrom; how the country was damaged and destroyed; and how this realm was in many ways immeasurably the sufferer. My lords, it then goes on to enact that the king (that is, Edward 3,) had ordered that the free election of archbishops, bishops, and all other dignities and benefices elective in England, should hold from thenceforth in the manner as they were granted by the king's progenitors and the ancestors of other lords, founders of the said dignities and other benefices. There were then at least, as there are ever in the history of England, evidences of the spirit of the crown rising in behalf of the rights of the people and the church, against the encroachments of the Pope of Rome. My lords, there is then an enactment, that where the Pope provides or makes provision of a dignity of the church,

(*w*) Vol. 3, p. 527; Keble's edition of 1836.

(*x*) *Supra*, p. 125.

(*y*) Statute of Carlisle, 35 Edw. 1, c. 4.

the king shall present, "as his progenitors had before that free election was granted, since that the election was first granted by the king's progenitors upon a certain form and condition, as to demand licence of the king to choose, and after the election to have his royal assent, and not in other manner." There is mention of the *Congé d'élire* in that statute. I believe, if it were looked into, it would be found that the *Congé d'élire* and letter missive go a long way back; but you find here the rights of the crown asserted against the Pope, in respect of those elections which it was said the Pope had encroached upon before the statute.

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My lords, there is no statute which need be called before your lordships' notice again, till the 23rd of Hen. 8, which was passed in 1531, the act restraining the payment of annates to the see of Rome. My lords, what had some of those monies which were taken from this country to Rome been for? It is specially mentioned that they had been for confirmations. Your lordships will find the act in *Gibson*, pages 105 and 106 (z). It recites that great sums of money have been conveyed out of the realm, for first fruits of archbishopricks and bishopricks, without which dispatch could not be had at the see of Rome, to the impoverishing of the nation, and sometimes the ruin of the friends of the persons promoted; which demands were made without any just title; that, from the 2nd of Hen. 7, eight score thousand pounds of sterling money had been paid for first fruits, besides other immense sums: and though the king and his subjects are obedient children of holy church; yet that, the said exactions being intolerable, there was now again an attempt on the part of the people to get rid of the payment of money and all duty to the see of Rome; and the estates have represented that the king is bound to repress them, especially now when divers prelates are in extreme old age. And it was enacted that all such payments, other than are declared in this act, shall cease; that no person shall pay them, on pain of the forfeiture of his goods to the crown; that if any person named to be a bishop is delayed or denied his bulls at the court of Rome, he shall be consecrated by his archbishop, being first named by the king; and an archbishop, being so let, shall be consecrated by two bishops to be named by the king, as divers heretofore have been; after which he shall be installed in the see, and enjoy all the spiritualities and temporalities, yielding to the king all duties. Then there is a certain qualification. In order to keep peace with the court of Rome, smaller payments to a certain amount are, by this act, allowed to be paid to the Pope, under certain qualifications and modifications. My lords, then there is, at the end of that statute, something in the nature of a right, which the king and those who were then advising him, (probably Archbishop Cranmer), no doubt intended one day to act on; for they say, if no redress may be had by those amicable means, but the court of Rome shall continue to enforce its exactions by excommunications or interdicts, in such case all the sacraments and divine services shall continue to be ministered in England, notwithstanding; and the excommunications and interdicts shall not be executed.

23 Hen. 8,
c. 20.

(z) Vide *supra*, p. 31, n. (s).

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gument.

Cranmer.

25 Hen. 8,
c. 19.

It was *durante* that statute, that Cranmer was consecrated Archbishop of Canterbury; and certainly, the conditions implied in that statute do, to a certain degree, explain, and it may be justify, some of his failings; because, if your lordships will remember, his bulls, as my learned friend stated (a), all came from Rome; but he made a protest against them, for the allegiance that was due to his sovereign lord in England. My lords, how those protests, and the Pope's bulls, can be reconciled, we may perhaps doubt in this time of better light; but that was the law of the land, and that at the time he obeyed.

My lords, let me now call your lordships' attention to an act which still more paves the way for the assertion of the crown's right of pre-eminence in all matters ecclesiastical as well as civil. My lords, in the very statute before this statute (I mean the 25th of Hen. 8, c. 19), which is entitled "an act for the submission of the clergy, and restraint of appeals," it was recited, that several canons had been thought exceedingly prejudicial to the king's prerogative, and repugnant to the laws and statutes of the realm. Here the king was about to get rid of those other incumbrances which pressed upon the law of England; and therefore, it was enacted, that the clergy should not enact any canons, constitutions, or ordinances, without the king's authority, convoking them to be assembled. By the same act, the king might assign thirty-two persons to examine the canons, and to continue such as they thought worthy, and to abrogate the residue. There were to be no longer appeals to Rome. And then, by the 7th section, the section we shall have to call your lordships' attention to more particularly, it was provided that "such canons, constitutions, ordinances, and synodals provincial, being already made, which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the king's prerogative royal, shall now still be used and executed as they were afore the making of this act, till such time as they be viewed, searched, or otherwise ordered and determined by the said two and thirty persons, or the more part of them, according to the tenor, form, and effect of this present act." My lords, I stop for a moment here, to ask your lordships whether, (as in the very next chapter of this year, chapter 20, was enacted), it does not look as if, at this moment, there was a clear intention on the part of the government to be bound no longer by the canon law, and that something was about to be enacted, which was to be above all such canon law, ordinances, or constitutions.

Then, my lords, comes the statute with which we have now to do.

Mr. Justice ERLE. I think the preamble of chapter 19, recites the king's supremacy in the most express terms (b).

(a) *Supra*, p. 130.

(b) "Where the king's humble and obedient subjects, the clergy of this realm of England, have not only known, according to the truth, that the convocation of the same clergy is, always hath been, and ought to be assembled only by the king's writ,

but also, submitting themselves to the king's majesty, have promised, *in verbo sacerdotii*, that they will never from henceforth presume to attempt, alledge, claim, or put in ure, or enact, promulge, or execute any new canons, constitutions, ordinance provincial, or other, or by whatsoever other name

The *Solicitor General*. Yes, my lord.

Mr. Justice ERLE. As just recognized by the clergy.

The *Solicitor General*. My lords, then comes the statute of the 25th Hen. 8, c. 20, with which we have now to do. It would be convenient to know in whom, at that time, was the right of confirmation all over the Christian world. My lords, I find in *Van Espen*, who was a professor of canon law in the Netherlands, I believe about the beginning of the last century (c), in part 1, tit. 14, *De Confirmatione Episcoporum*, caput primum, placitum 8. "Inquiritur quâ occasione episcopi aliquando pro suâ confirmatione ad Sedem Apostolicam recurrerint. Inter nonnullas occasiones quæ solent afferri, illa certior videtur, scilicet, quòd sicuti per Reservationes Pontificias, quæ potissimum à Joanne XXII. incrementum accepêre, ad Sedem Apostolicam, seculo 14, provisiones sive nominationes fuere devolutæ; atque eo titulo electiones canonicæ quodammodo abolitæ; pariter jus confirmandi episcopos metropolitani ademptum, et Sedi Apostolicæ fuerit reservatum. Indignum quippe credebatur, ut à Romano Pontifice ad episcopatum designatus, a metropolitano confirmationem petere et accipere jurebatur. Quid enim id aliud, quàm nominationem Pontificiam metropolitani judicio probandam vel improbandam subjicere?" And then in the next placitum—"Licet vero hæ Pontificiæ reservationes quoad episcopatus et prælaturas, sive per concordata sive per indulta ac privilegia regibus concessa, quoad nominationes et electiones ad cathedrales ecclesias fuerint in multis restrictæ; scilicet reservando ipsis capitulis canonicas electiones, uti contigit per Concordata Germaniæ; vel jus nominandi regibus ac principibus indulgendo: tamen confirmationes Romano Pontifici hactenus reservatæ manserunt; nec quidquam juris metropolitani restitutum est" (d).

Mr. Justice PATTESON. Where is that?

The *Solicitor General*. In *Van Espen*. Now the question is, in respect of confirmation, of what account was it at the time of Henry 8, when this statute passed? My lords, of whatever value it was to the Pope, it was to be of equal value at least to the king. The Pope might dispense with confirmation: so might the king. The Pope might call for confirmation: so might the king. The Pope might prescribe the mode and the rituals proper to confirmation: so might the king. *Van Espen*, where he is speaking about the form of confirming bishops, says, it does not seem to have been a constant form in all countries. That is a matter of some importance, when we are to inquire what are the constitutions, if any, which can be applied to confirmations in this country, or whether such constitutions, if any, are not restrictive of the

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Van Espen. The right of confirming belonged to the Pope, at this time.

The king had the same powers, as to confirmation, as the Pope.

they shall be called, in the convocation, unless the king's most royal assent and licence may to them be had, to make, promulge, and execute the same; and that his majesty do give his most royal assent and authority in that behalf."

(c) Born at Louvain, in 1646;

where he became professor in 1675. He afterwards retired to Maestricht, and ultimately to Amersfort, where he died, in 1728.

(d) Van Espen, *Jus Ecclesiasticum Universum*, tom. 1, p. 98 (Louvain, 1763).

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General's argu-
ment.

Power of the
crown to dis-
pense with
canonical age.

prerogative royal. My lords, in the second chapter of the same book—

Mr. Justice COLERIDGE. You say, Mr. *Solicitor General*, that the crown stands in the place of the Pope, in this matter; and what the Pope could dispense with, the crown can. I understand from the *Attorney General* (e), that he lays it down that the Pope could dispense with the canonical age, if the party named to a bishoprick was under age. Then does your argument go to this, that the crown might dispense with that too?

The *Solicitor General*. I will not say that. I should be very sorry to say how far the crown could do a thing which is wholly unreasonable and unfit. My argument is, that, for the good of the realm, the Pope's authority is in the crown, and that so far as the Pope's authority should be exercised by the crown, so far only will the crown exercise it. My lords, as to the canonical age, I have not considered that to be a thing the crown is likely—

Mr. Justice COLERIDGE. I am not supposing that the thing is likely.

The *Solicitor General*. I was going to say this, that when the statute of Henry 8 passed, it gave to the crown such complete discretion in the matter, as to assure the country that the crown would not present to a bishoprick any person who was not meet for that purpose. It was left with the crown.

The *Attorney General*. The crown is bound, in reference to age, by the statute of Edward 6. That statute prescribes the age.

Mr. Justice COLERIDGE. That is subsequently. We are now upon the statute of Henry 8. What statute is that of Edward 6?

The *Solicitor General*. It is 194 c, in *Burn's Ecclesiastical Law*—"Of archbishops and bishops in general.—By the preface to the form and manner of making, ordaining, and consecrating of bishops, priests, and deacons, (confirmed by acts of parliament, 3 & 4 Edw. 6, c. 10, 5 & 6 Edw. 6, c. 1, 8 Eliz. c. 1, 13 & 14 Car. 2, c. 4), every man which is to be ordained or consecrated bishop, shall be full thirty years of age." Therefore there would in fact be a positive statutable bar to the crown doing that. But my argument was this, that the Pope's discretion was the crown's discretion; that what the Pope did for the good of Christendom, as he thought, the crown was to do *qua* the Pope for the good of England, as he thought. He was not to be bound by canon laws, which were not for the good of this realm, or which were in restraint of his prerogative. He was to have that power which he has exercised from the time it was given him, without any kind of bar or exception to it, till the present day.

The *Attorney General*. The Pope could have got rid of non-age.

Mr. Justice COLERIDGE. I am assuming that. I wished to know whether the *Solicitor General's* argument was, upon that statute, that the crown could have done so.

The *Solicitor General*. I am anxious, my lord, in respect of the question which your lordship put, to say, that the crown's discretion was not barred at all at that time. An absolute discre-

Crown's dis-
pensing power
commensurate
with that of
the Pope.

tion was entrusted to the king by parliament, with a full confidence in his discretion and honesty to the church, that he would not do those things, which I believe he ought not to be charged with doing indiscreetly and faithlessly, as if he had no object but his own personal aggrandizement to secure. The crown at that time, and ever after, was, in the contemplation of law, the faithful patron of the bishopricks of the land; and it is not to be assumed that the crown will do any thing in violation of the sacred trust with which it is invested by this act of parliament.

I will now, with your lordships' leave, refer but in general to the statute of Hen. 8, c. 20. Surely it is a remarkable thing, that, it being altogether the shadow of an election by *Congé d'élire* and letters missive, there was given to the crown a power by letters patent (if the persons who ought to elect under a *Congé d'élire* refused to do their duty), to make a bishop at once without any confirmation; as if it were a matter of little importance to the church. If the electing body refused to act under the *Congé d'élire*, there would be a bishop made under letters patent without any confirmation, which of course a donative of the crown would not need.

And what is the worth that at that time of day was attached to confirmation? Will your lordships say, that confirmation is so singularly marked out in the proceedings that are to take place after the election under the *Congé d'élire*, as to become of any importance in the view of the statute? My lords, surely, if confirmation were a substance of such importance as they seek to make out, it would at no time have been taken away. The crown would at no time have been able to do that which the crown has ever since done in Ireland, and which the crown, as I will shew your lordships, in this very reign, by two other statutes, was empowered to do in England, in matters of suffragan bishops, and in matters of new bishopricks which the crown was empowered to make.

My lords, let me turn for a moment to the 26th of Hen. 8, c. 14. That was an act "for the nomination of suffragans, and the consecration of them." What was the plan of making those bishops? Confirmation had no part in it. The bishop was to choose two proper persons to present to the crown, of whom the crown was to select one, and then to take steps whereby the archbishop was to consecrate him; but no mention is made of confirmation. The thing did not seem to be required in the constitution of a suffragan bishop. And when your lordships come to think what manner of man a suffragan bishop was; that he had power to confer orders, and to do other things which are of as high a nature as those done by the best confirmed bishop of the land; I cannot help thinking the argument is conclusive, that the parliament of those days did not conceive of confirmation, that it was a very necessary or essential article in the making of a bishop.

Now, my lords, the case as suggested in the statute with which we have to do, (I mean always chapter 20 of the 25th of Hen. 8), is this: that the crown was invested with the discretion to choose a bishop, whom afterwards the dean and chapter at their peril were to refuse. The crown's choice was supposed to be a right one. The

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25 Hen. 8, c. 20.

The unimportance of confirmation shown, by its being abolished or waived in several cases.

26 Hen. 8, c. 14; for the nomination of suffragans.

No confirmation under that act.

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gument.

discretion given to the crown, it was assumed, would be exercised for the good of the church and of the realm. Now, in this Suffragan Act, in whom is the authority of the same kind vested? The act says, "Every archbishop and bishop of this realm, and of Wales, and elsewhere within the king's dominions, being disposed to have any suffragan, shall and may at their liberties name and elect, that is to say, every of them for their particular diocese, two honest and discreet spiritual persons, being learned, and of good conversation." Very apt words, and words, I suspect, to be found, if not in terms, at least in meaning, in every letter patent that has gone forth under the great seal. There is here given to the bishop, (who is in truth, in this instance, the moving power), the same power that is given under the 25th of Henry to the crown, which is the moving power there; and there is, in each case, a free discretion lodged with the moving power. If you say, in the one case, that the archbishops and bishops, who are appointing suffragans, might make a wrong choice, I admit that, in the other, the king might do so too. But, in this latter case, the king was invested with the absolute power of choosing whom he pleased, out of all his dominions, supposing the person chosen was qualified in other respects to be bishop of the place. In the other case, the archbishops and bishops were to choose two honest and discreet spiritual persons, being learned, and of good conversation; and those persons were to be presented; "and the king's majesty, upon every such presentation, shall have full power and authority to give to one of those two persons, so to his highness to be presented, the style, title, and name of a bishop of such of the sees aforesaid, as to his majesty shall be thought most convenient and expedient, so it lie within the same province whereof the bishop that doth name him is." So that, it would seem, there was to be presented to the crown, for the purpose of becoming suffragan, a man chosen by the archbishop or bishop, who was honest, discreet, spiritual, learned, and of good conversation. (My lords, that word "learned" is a matter of some importance, when we come to consider what is the meaning of the word *persona*, upon which I shall have a word or two presently to say). After presentment made to the crown, the crown commands the archbishop, at a certain time, to consecrate the suffragan; and it is further directed, "that every archbishop of this realm, to whom any the king's letters patents, in the cases afore rehearsed, shall be directed, having no lawful impediment, shall perform and accomplish the effects and contents of this act within the time of three months next after such letters patents shall come to their hands; any usages, customs, foreign laws, privileges, prescriptions, or other thing or things heretofore used, had, or done to the contrary hereof notwithstanding" (f).

My lords, in a very short time afterwards, (I refer to the 31st of Hen. 8, c. 9) (g), there was another act, enabling the crown to do

31 Hen. 8,
c. 9.

(f) Sect. 5.

* For employ-
ment of reli-
gious folk, &c.;

(g) This act, which is printed in
The Statutes of the Realm, vol. 3,
p. 728, is as follows:—

"An Act for the King to make
Bishops.

* "Forasmuch as it is not unknown
the slothful and ungodly life which

without confirmation altogether, and to make bishops as it pleased. It is said that the king intended to make seventeen or eighteen, but to make them by letters patent, without reference to the archbishop or any person to confirm them. The act is not given in the 4to statutes; but your lordships will find, in the Appendix to *Burnet's History of the Reformation* (h), one of the patents. A patent to the Bishop of Westminster is there set out, in which your lordships will find that the king, as he does in the letters patent in the present case of Dr. Hampden, asserts the choice that he has made, of a man of honesty and integrity, and learning, and that he is a proper person to be bishop of the see of Westminster. We know that that see failed. We know also that the other five (i) which were made about the same time, still survive. How it happened that they have fallen away to be elective by a *Congé d'élire*, I cannot imagine. I dare say there may be differences of opinion; but being against all shadows and all shams, whether they lie in the election of bishops or anywhere else, I think it would be a comelier thing, if, instead of those forms

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hath been used amongst all those sort which have borne the name of religious folk, and to the intent that from henceforth many of them might be turned to better use as hereafter shall follow, whereby God's word might the better be set forth, children brought up in learning, clerks nourished in the universities, old servants decayed to have living, almshouses for poor folk to be sustained in, readers of Greek, Hebrew, and Latin, to have good stipend, daily alms to be ministered, mending of highways, exhibition for ministers of the church: It is thought therefore unto the king's highness most expedient and necessary that more bishopricks, collegiate, and cathedral churches shall be established, in stead of these foresaid religious houses, within the foundation whereof this other titles afore rehearsed shall be established: Be it therefore enacted by authority of this present parliament, that his highness shall have full power and authority from time to time to declare and nominate, by his letters patents or other writings to be made under his great seal, such number of bishops, such number of cities, sees for bishops, cathedral churches, and diocese, by metes and bounds for the exercise and ministration of their episcopal offices and administration as shall appertain, and to endow them with such possessions, after such manner, form, and condition, as to his most excellent wisdom shall be thought necessary and convenient; and also shall have power and authority to make and devise translations, ordi-

nances, rules, and statutes concerning them all and every of them, and further to do all and every thing and things, whatsoever it be, which shall be devised and thought requisite, convenient, and necessary by his most excellent wisdom and discretion, for the good perfection and accomplishment of all and singular his said most godly and gracious purposes and intents touching the premises, or any other charitable or godly deeds, to be devised by his highness concerning the same; and that all and singular such translations, nominations of bishops, cities, sees, and limitation of diocese for bishops, erections, establishments, foundations, ordinances, statutes, rules, and all and every other thing and things, which shall be devised, comprised, and expressed by his grace's sundry and several letters patents or other writings under his great seal, touching and concerning the premises or any of them, or any circumstances or dependances thereof, necessary and requisite for the perfection of the premises or any of them, shall be of as good strength, force, value, and effect, to all intents and purposes, as if such things, that shall so be devised, expressed, and mentioned in his letters patents or other writings under his great seal, had been done, made, and had by authority of parliament."

(h) Vol. 1, part 2, p. 371, (Oxf. 1816).

(i) Namely, Chester, Gloucester, Peterborough, Bristol, and Oxford.

The king
empowered to
nominate
bishops, and
to appoint
bishopricks,
&c. by his
letters patents,
which shall
be valid as if
by authority of
parliament.

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gument.

Abolition by
1 Edw. 6, and
revival by
1 Eliz. of elec-
tion by *congé
d'élire*, &c.

Reason of such
revival inex-
plicable.

Different
modes pursued
by Elizabeth
in England
and in Ireland.

2 Eliz. c. 4.
(Ir.)

Confirmation
then con-
sidered of no
great avail.

Policy of all
the acts was to
leave the sole
right of judg-
ing in the
crown.

(which are but forms), instead of this election by *Congé d'élire*, which we know by the statute, and by the description historians give of it, in reality was nothing but a shadow, it had been better, I say, if things of that sort were put away from this realm.

Before I come back to the statute of the 25th of Hen. 8, I may as well refer your lordships to the statute of Elizabeth, which my learned friend brought before the court (*j*). The statute of Edward (*k*), it will be remembered, had abolished elections by *Congé d'élire*, and made all the bishopricks donative. Why parliament and the wise men of the day, in the first year of Elizabeth, decided against that last mentioned mode, I do not know. I know speculation may be very wide afield, before it hits upon the true reason of the thing; whether it was, as some believe, to keep alive the respect for the old church from whom we take our origin; or whether it was to gratify some of the lingering wishes of the people who were about Henry, that those shows were kept up, historians are puzzled to decide, and I believe it is yet to be determined. But, as respects Elizabeth, we know that, at the time in which this statute passed which revived the statute of Henry 8, in the first year of her reign she was reviving the statute with all its shadows, and in the second she was enacting a law for Ireland, which still obtains; under which law the bishopricks of that country are at this moment donative (*l*). I am sure I cannot furnish any reason for this. But here is the act; and the act is express to show that, at that time, confirmation was considered of no great avail in the matter of the making of bishops. But, my lords, your lordships will find that, in the first section, after using almost the express terms of the statute of Edward 6 (I will not tire the court by repeating them, though they be sound and good learning), she says, that she may, by her letters patent, appoint and confer any archbishoprick or bishoprick when it is void.—“Confer the same to any person, whom the queen, her heirs, or successors, shall think meet.”—My lords, I rely upon that word. I believe that the object of Henry 8, and all these acts, was to leave to the crown the power of judging whether the man was meet. I know that these words, or similar ones, are to be found in the letters patent and the missive. I find them in the statutes which give the king of England from time to time the power to appoint, whether it be by his own letters patent, as in the statute of the 25th Henry 8, or after having men recommended to him, as under the statute of Henry 8, concerning suffragans, or in this statute of Elizabeth: it is always “whom the crown *shall think meet*.” That is to say, a judgment is to be formed by the crown upon the man, whether he will suit the exigency of the case. It is the crown's prerogative to judge; it is not the prerogative of any man, like Mr. Gutteridge, or anybody else. It is the crown's prerogative; and if you shake that prerogative, you must have some high-handed act of parliament to put things straight; or I firmly believe, upon the best understanding which I can give the matter, that the peace of the church

(*j*) *Supra*, p. 139.

(*k*) 1 Edw. 6, c. 2, *supra*, p. 138.

(*l*) 2 Eliz. (Ir.), c. 4, *supra*, p. 139.

will be destroyed, and it will be a triumph and glory to her enemies.

My lords, Elizabeth, in this first section, says that she may confer the office upon any person whom she shall think meet. "The which collation so by letters patents made in manner aforesaid, and delivered to the person whom the queen, her heirs or successors, shall confer the same archbishoprick or bishoprick, or to his sufficient proctor and attorney, shall stand to all intents, constructions, and purposes, to as much and the same effect as though *Congé d'élire* had been given, the election duly made, and the same confirmed." So that here there was in the mind of the maker of the act, that is, of the parliament of the time, what was the virtue of confirmation (if any) in respect of sufficiency; for it was said, that that appointment under the letters patent was to be as good, and should stand to all intents and purposes the same as though *Congé d'élire* had been given, and election duly made, and the same confirmed. My lords, it goes on: "And that, upon that, the said person to whom the said archbishoprick, bishoprick, or suffraganship is so conferred, collated, or given, may be consecrated, and sue his livery or *ouster le maine*, and do other things, as well as if all the said ceremonies and elections had been done and made." My lords, this is in *pari materia*, within a very short time of the statute of Henry; when men understood what the king and the parliament must have been about in the passing of that statute; what it was by parliamentary acknowledgment; and what was the meaning and sense to be given to the ceremony of confirmation, in respect of appointments confirmed by the archbishop under letters patent.

Then, my lords, by the 3rd section of the act of Elizabeth, the archbishop is, "with all speed and celerity," (these very words are introduced from the statute of Henry 8) to "invest and consecrate the person conferred aforesaid, to the office and dignity that such person shall be so conferred unto, and give use to him, pall, and all other benedictions, ceremonies, and things requisite for the same, without suing, procuring, or obtaining hereafter any bulls, or other things, by or from any foreign authority, or power, for any such office or dignity, in any behalf." And there is the same penalty of *præmunire* upon refusing to invest, which is mentioned in the former statute referring to the statute of Edward 3, and the statute of *præmunire* of Richard 2 (*m*).

My lords, here I would just say, that I do not know whether the objection is to be made to-day, which was made elsewhere (*n*), that these penalties of *præmunire*, spoken of in the statute of Henry 8, must be penalties only in relation to something done to, from, or at the court of Rome. It is perfectly clear, in the law, that *præmunire* will attach to many and many a thing which has nothing to do with Rome. There are cases ancient and modern, and all sorts of authority to that effect. Under "*Præmunire*," in *Comyn's Digest*, will be found sufficient to show that *præmunire* attaches to things which have nothing to do with ecclesiastical or spiritual interests. I refer your lordships at once to that part of *Comyn's*

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The Solicitor General's argument.

Præmunire attaches to many offences unconnected with Rome.

Com. Dig. *Præmunire*, B.

(*m*) *Supra*, p. 29, n.

(*n*) *Supra*, p. 41.

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Archbishop of
Canterbury.

The Solicitor
General's ar-
gument.

Rex v. Ca-
wood.

Commencing
with prayer
does not render
the ceremony
of confirmation
less a mere
matter of form.

Unfettered
right of selec-
tion in the
crown, shown
from the
Congé d'élire
and letter
missive.

Digest, B., quoting from the 3rd Institute, 120 and 123, where Lord Coke says, that drawing the inquiry of a cause *ad aliud examen*, where it ought not to go, as for instance, after a judgment of this court, suing in Chancery, or taking some step of that sort, a man may incur a *præmunire* for it. Surely, that has nothing to do with the court of Rome, as was suggested in another place, and argued with a great deal of learning. My lords, there is another authority upon the subject, *The King v. Cawood*, in *Lord Raymond's Reports*, p. 1361, which was a proceeding upon the Bubble Act, 6 Geo. 1, c. 18, s. 19; where it was held perfectly clear that a *præmunire* under the statute of Richard (o) could be incurred.

LORD DENMAN. You need not go further into that, I think, Mr. Solicitor. Only it is not within this statute.

The *Solicitor General*. I am not going further, my lord. The argument, as I understand, is this, that in order to incur a *præmunire* under the statute of Henry 8, (the one that we are upon) there must have been some impediment offered by a person attending, with a view to the court of Rome. I understand that that has been suggested as an argument; and I say that, if such an argument is used, your lordships will see the very words of the statute of King Henry 8. If any person do "any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of due execution of this act," (those are the words,) then he shall incur a *præmunire*.

Now, my lords, upon the affidavit it is stated, (and I would almost rather not refer to it,) that the proceedings at Bow Church began with prayer. It is to make it appear that a proceeding, which began with prayer, cannot be supposed by good and wise men to be a proceeding where nothing but show or ceremony was to be done. My lords, I fear it is too true also, that the proceedings on the *Congé d'élire*, before the dean and chapter,—whether beginning with prayer or no I do not know,—certainly ended with praise; because that is according to the canonical procedure. *Te Deum* is always sung; but still those are but matters of form. There is a mere ministerial act to be done by the dean and chapter, which they must do, under a penalty, if they do it at all: or if they choose not to do it, then the king is provided with other means by which to do it himself.

Now, my lords, I must call your lordships' attention to the words of the letter missive in this case. My lords, by the *Congé d'élire*, the dean and chapter are allowed to "elect such a person for your bishop and pastor, as may be devoted to God, and useful and faithful to us and to our kingdom." By the letter missive it is stated, "We let you weet, that, for certain considerations as at this present moving, we of our princely disposition and zeal being desirous to prefer unto the same see a person meet thereunto, and considering the virtue, learning, wisdom, gravity, and other good gifts wherewith Dr. Hampden is endued, we have been pleased to name and recommend him unto you, to be elected and chosen." Then, my lords, was it of the royal prerogative to choose a bishop before he was elected,

not merely because he was a subject of the realm, but because, in the opinion and judgment of the crown, he had those qualities which would make him a good bishop? My lords, I say it was; and I say, any laws borrowed from the canonical constitutions, or any constitutions you please, which are in restraint of that royal prerogative, are not the law of the land; and if you tell me that you are prepared, at any time whatever, to show that the crown's prerogative was ill exercised,—that the crown had chosen a person of unsound doctrine we will say,—I answer you by saying, the crown, by act of parliament, was invested with a pre-eminence far above that: it had not to ask you or me, or any one, what sort of a man the bishop was; but, so far as in the judgment of the crown, by the discernment of the crown's advisers, a man is thought fit, there is the exercise of the discretion of the crown in this matter, and there the prerogative of the crown. My lords, such a man, so by the royal prerogative named, and appointed by the *Congé d'élire* and the letter missive, the dean and chapter have elected: can anything touch that election? can anything touch that election, in respect of the quality of the man? My lords, I suppose it may be plainly answered, nothing can. The words of the statute are imperative upon that. This election, be it of a person ever so unworthy in the opinion of some of the members of the chapter, is still worthy enough to be recommended to them by the crown, in the exercise of its royal prerogative. "Then their election shall stand good and effectual to all intents." Now why should it be supposed that afterwards the crown is to relent, so to speak, and to allow persons to come in and prevent the man from being confirmed, when it would not allow them to come in and prevent him from being elected? It is a very strong thing, we will say, to tell the dean and chapter of any cathedral, this man and none other you shall elect; but, the stronger the thing, the more for my argument, that the crown was invested with these pre-eminences for the good of the country. Then, if it had that pre-eminence before the election, why should it lose it after? Is there any particular reason that can be assigned why, at the time when the archbishop comes to confirm, and not at that time when the man is consecrated, there should be an opportunity given to opposers to come in? My lords, I should like to hear good reason given for that: he is the same man; he has the same gifts; there is no presumption to be made that the crown's mind is changed; the assent of the crown has been given and been taken to the election of the man; he stands the bishop elect by law; as bishop elect by law, he can perform certain ministerial acts; I believe he can excommunicate and do certain other things, as bishop elect, before confirmation. Why should it be supposed, that, while he has this power, as laid down in *Fitzherbert's Natura Brevium* (p), when he is bishop elect, while he has that power from which they then cannot shake him, they should all the while have an authority behind to throw him on his back when he comes to be confirmed; to say, "No: further you shall not come: you have, it is true, by law got to be bishop elect; that is your name and title in law; but beyond that the crown's

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The Solicitor General's argument.

Absurd to suppose opposition allowable at confirmation, when none allowable at election;

or at consecration.

Argument derived from the indefeasible powers acquired, on election, by the bishop elect.

Power of excommunication. F. N. B.

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Archbishop of
Canterbury.

The Solicitor
General's ar-
gument.

No book of
authority
shows how the
right of oppo-
sition is to be
exercised.

Lyndwood.

Archbishop
Peckham.

authority does not extend?" My lords, does not this trench upon the prerogative royal of the crown? To tell the crown you can go thus far, and no further; to say, you have the discretion which you have exercised for a particular purpose, which purpose at the same time is a shadow and a show; and then to tell the crown that it cannot carry on its executive measure, that it cannot by its letters patent direct the same person, whom by its prerogative power it has commanded to be appointed, to be confirmed and to be consecrated;—to assert this, I must say, appears to me without a reason for it, which can be shown in any book of authority.

But, my lords, is it not a surprising thing, if this power of opposing has always lain somewhere, that not one of the books of authority shows you how it is to be exercised? I defy my learned friends to show, from any of the English authorities, how this is to be exercised; and therefore they are driven to the canonists, to find from them what is said upon this subject, and how this business of theirs is to be performed. And, my lords, by the English canonists, I mean *Lyndwood*, and the *Constitutions of Othobon* by *John de Athon*. I say, there is no authority given, even if that canon law applies to this case, which I contend it cannot by the common law of the land,—by the 20th of Henry 8, c. 19 (q). Even if that canon law and those constitutions can be applied (which I contend they cannot), supposing even that they have force in themselves, from their innate good sense and other qualities, still, I say, neither *Lyndwood* nor *John de Athon* carries the case one step further.

My lords, my learned friend cited a passage from *Lyndwood* (r), to which, with your leave, I will now call your notice. It is, my lords, in the edition that I have in my hand, which I believe is the best, the Oxford edition, page 217. There, is to be found a Constitution of John Peckham, Archbishop of Canterbury about the year 1279. Now that is what my learned friend referred to, for the purpose of using the gloss upon it. My lords, I undertake to show your lordships that that Constitution has nothing earthly to do with this case; and that, even if this gloss of *Lyndwood* is to be literally taken for law, if there be nothing either in it, or in the law of the land, to prevent the use of it,—if there be anything in it,—I undertake to show that it is the mere opinion of a man citing doctors whom he does not name, and authorities which we cannot find out, and professing to give a turn to the argument, which I think, upon the fair grammatical construction and use of the language employed, it is not entitled to bear. My lords, the Constitution is very short, and I will read it. "*Nullus prælatus*"—that is, a person of certain dignity in the church,—"*Nullus prælatus, excepto episcopo, inquirat de presentatione, nisi in pleno loci capitulo; concesso prius prospiciendi spatio*" (giving proper notice I suppose). "*Contra quod statutum quæ de cætero fient, irrita sint, restituto laicis damno.*" That is the title or preface to the Constitution. Here is the Constitution itself. My lords, it speaks about presentation; it has nothing to do with bishops; bishops are expressly excluded from the operation of it. "*Per nostram provinciam et*

(q) *Supra*, p. 169.

(r) *Supra*, p. 113.

infra. Statuimus, et perpetuo ordinamus, ut nullus decanus seu quivis prælatus alius, exceptis personis episcoporum, quorum hâc ordinatione auctoritas non arctatur, inquisitionem faciat de præsensationis alicujus ad beneficium ecclesiasticum negotio, nisi in pleno loci capitulo, eo cui possessio ecclesiæ incumbit vocato legitime" (the possessor of the church, the patron, or some person who had the right, I suppose), "sub tanti temporis spatio quo possit sibi prudentum virorum consilio prospicere, et defensionis status sui de sufficienti remedio providere. Quicquid autem"—Now, my lords, it is upon this last member of the sentence that the whole gloss hangs—"Quicquid autem de cætero contra hanc nostram ordinationem fuerit attentatum decernimus penitus *non tenere*;" it will not do; it will not hold.

Let me refer to one or two points of the gloss, upon those parts which precede "*non tenere*." In the first place, my lords, here is the gloss of *Lyndwood*: we are to form our judgment of his work just in the best way we can. Just see, my lords, what he presumes to say of the words which I read,—"*Nullus decanus seu quivis prælatus alius, exceptis personis episcoporum, quorum hâc ordinatione auctoritas non arctatur.*" Upon the word "*auctoritas*" what does he say? "Supple, cunctos alios prælatos inferiores in talibus excedens." Then his gloss on the words "*non arctatur*," is, "Supple, secundum intentionem statuentis; an vero arctetur secundum ea quæ leguntur et notantur *de elec. c. ult. li. 6*, vide *infra*, § *proxi. ver. non tenere*." Therefore, what he aims at, my lords, is this. The ordinance having distinctly said that the authority of bishops was not to be touched, he, nevertheless, wants to do something with their authority, and he says, See what I say under the words *non tenere*. Now see what he says; for this is the gloss which I think my learned friend read: "Simile habes in confirmatione electionis, sive in non concordia sive in concordia fuerit celebrata, ut scilicet non teneat confirmatio, etiam per episcopum facta" (I take it, that is not a bishop's confirmation, my lords: it is the confirmation by a bishop), "absque eo, quòd coelectus, si quis sit, vel hi qui se opponere volunt, quando est unicus electus, nominatim vocentur, et coelectus est certus, vel etiam oppositores sunt certi. Alioquin si incerti sint, quòd vocentur in genere secundum formam quæ habetur *de elec. c. ult. li. 6*, ubi *Doctores*, quos vidi, quoad concordantiam materiæ hujus, prout benè intelligens eos applicare poterit, ponunt conclusiones quæ sequuntur." That is the first part of the gloss. Now this is the part read by my learned friend: "Una conclusio est"—(that is, the conclusion of the Doctors whom he saw),—"quòd in negotio electionis, de quâ hic loquitur, non sufficit sola citatio eorum quorum interest, sed opus est discussione negotii: alioquin non valet confirmatio." My learned friend, your lordships remember, argued upon the word *discussio*, that it meant an argument at the bar; that there was to be opinion pleaded against opinion; in fact, that there was to be a public display of different opinions upon the subject; which, I am prepared to show from the canon law, and from the meaning of the word *discussio*, never can be applied so. *Discussio* is bad Latin; and, my lords, it is used by only one order of people; and a very indifferent order

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they were. But *discussio* is the mere handling of a thing; but, by the gloss, it means the examination of a thing which the subject requires. It is not an argument, a logomachy, in public; it is a putting together in your own mind, as South and others say, of the several points in your mind which may be discussed: every point which is capable of being discussed you discuss and consider. But to return to *Lyndwood*. He says, "*Alioquin non valet confirmatio. Et hoc apparet ex textu dicti capituli ultimi, dum dicit, nullis vocatis, et non discusso negotio. Hæc est conclusio, Jo. An. in no. dicto c. ul. ver. non discusso. Ex qua conclusione apparet, quòd in negotio præsentationis, quod æquivalet negotio electionis, ut infra dicitur, non sufficit vocationem fieri, sed cum hoc opus est discussione negotii.*" My lords, I believe that is what my learned friend read: that is the first conclusion. "*Alia conclusio est, quòd licèt confirmatio electionis, sine vocatione facta, sit irrita et inanis, electio tamen tenet in suo robore et vigore, ita quòd iterum quæri debeat de viribus ipsius electionis.*" There is not a single syllable there, my lords, about a bishop's election. My lords, I say that, in the Constitution itself of *John Peckham*, bishops are specially excluded from the law; their authority is not restrained; there is no power here to include a bishop within the operation of the law. And then, for the purpose of saying that the gloss applies to the case in hand, my learned friend is obliged to apply to a bishop things which in fact apply to another election and presentation. It is a case, my lords, which, I say, is not applicable here, even were it, by the law of the land, to be taken as a constraining authority in the matter to which it properly applies.

Constitutions
of Othobon.

Yet, my lords, that is one of the authorities which my learned friend read from the canon law of England, properly so called, if it can be cited in favour of his view. There is another quotation, which my learned friend made, from the *Constitutions of Othobon* by *John de Athon* (s): it is to be found in page 133 of those Constitutions, under the title "*De Confirmatione Episcoporum*;" and therefore, no doubt, it does apply to the case of bishops who come to be confirmed by whoever is their superior to confirm them. My lords, this Constitution, made in the time of Henry 3, is the gloss upon which Sir *Henry Martin*, I suppose, relies, in the case which I read from the *Parliamentary History* (t), which says that the election shall be in the church. My lords, the *Summarium*, the heading of that Constitution of *Othobon*, is this, "*In virtute sanctæ obediencie districte statuit et præcipit, ne quisquam episcoporum confirmetur, donec præter cætera*" (I will call your lordships' attention to *præter cætera*) "*canonice inquirenda etiam diligenter inquiratur an confirmandus plura beneficia incompassibilia sine dispensatione obtinuerit, quo comperto nullatenus confirmetur.*" So that, in truth, this was in the nature of a fishing bill, to know what the bishop, who came to be confirmed, had in him of incompatible benefices, in order that he should be made to disgorge them. That is the true purport of this Constitution; and you will see, my lords, how it is to be applied. My learned friend read only the

(s) *Supra*, p. 114.

(t) *Supra*, p. 162.

second section of it. He read it to your lordships as an authority in this case; but you will see that, as it stands, it really has no application; nor, taking the whole together, (which is but fair), can it have the interpretation which he contends for "*præter cætera*" in the title. There is no mention of what the expression *præter cætera* means: we are to gather that somehow; but, "*præter cætera*," besides other things, you are to see "*an confirmandus plura beneficia incompassibilia sine dispensatione obtinuerit.*" Now that is the object of this Constitution. My learned friend, Sir Fitzroy Kelly, read the following: "Quod si in aliquo præmissorum is, ad quem confirmatio spectat, electum deficere sua discussione compererit"—(there is the meaning of *discussio*, my lords)—"*eidem nullatenus munus confirmationis impendat.*" It is necessary, in order to understand it, it is fair, in order to give it its true meaning, to see what are the *præmissa* to which it has reference. My lords, there is a preface, of the *eminence of the Pastoral Seat*; into which I am not about to enter. It is, "Ut talis ad eam persona conscendat, quæ nullis (quantum humanitus possibile est) sit maculis denigrata. Quorundam igitur ignorantiam, vel negligentiam, aut dissimulationem quæ contra electorum confirmationes frequenter habetur, vel etiam procuratur ex officii nostri debito, diligentiam quâ possumus, corrigentes, Statuimus, et in virtute sanctæ obedientiæ præcipimus districte, ut cum electionis episcopalis confirmatio postulatur, inter cætera super quibus inquisitio et examinatio procedere debet, secundum canonum instituta, illud exactissime inquiretur, utrum plura beneficia cum animarum curâ, qui electus est, antequam eligeretur, habuerit, et si habuisse inveniatur, an cum eo super hoc fuerit dispensatum, et an dispensatio, siquam exhibuerit, vera sit et ad omnia beneficia, quæ obtinuit, extendatur." Why, my lords, here is a clear investigation whether a man has got dispensations for the benefices he holds, when he comes to be confirmed. There still remains the question, what do you mean by "*præter cætera*?" I say, there is no authority here, none in the world, to show what "*præter cætera*," means: you are left just as you were before; and you are to hunt in the canon law, if you can find it, for a proper notion what those particular "*cætera*" mean.

The gloss of *John de Athon* disentitles him, in my humble judgment, to very much consideration. The text says, "Inter cætera super quibus inquisitio et examinatio procedere debet." He puts in the margin, "Præcedunt enim in confirmatione plura inquirenda, s. tam de meritis electi quam eligentium. Item tam de materiâ quam de formâ." And then the text proceeds, "illud exactissime inquiretur." Upon the word "exactissime," his gloss is, "*i. e., diligentissime.*" Per quod videtur quod a mulieribus et sociis criminis super hujusmodi inquire possit."

My learned friend, when he was speaking of the former gloss, the gloss of *Lyndwood*, (which, I say, does not apply to John Peckham at all, and which John Peckham has nothing to do with, and which itself does not apply to the case of bishops), contended, that *discussio negotii* necessarily and naturally applied to logomachy at the bar, that is to say, an argument. Now, my lords, let us see what he read, "Quod si in aliquo præmissorum is, ad quem confirmatio spectat,

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electum deficere sua discussione compererit,"—that is, by inquiries of his own, directed how he likes. Here is the gloss: "*Discussione*: id est, inquisitione et examinatione." But be it so, that this is the confirmer. By these Constitutions, or rather by the notions of the times, he had a right to examine into certain things. Has the archbishop in this case, the confirming archbishop, any right to do anything of the kind? The cases are quite different: the confirming bishop has a right, in the case put by John de Athon, to look into the merits of the election, and of the electors and the elect; and he has a right *exactissime* to look into what benefices the elect has not a proper claim to, or which he holds without dispensation. Those are things utterly inconsistent with any thing which is now set up on the part of these opposers. They do not claim to do any thing of the kind; and why not, I pray you? If this be the law of the land, why do they not take the whole of the law of the land? What right have they to except to one part of it, and to choose the other? Is there a practice prevailing? I deny the practice. My lords, I say that my learned friend, from anything cited in this volume which I hold in my hand, has not satisfied the court, by reasonable deduction derived from the canonists of the time, what it was that was to be inquired into, at the confirmation of bishops. His duty is to satisfy the court that that was to be inquired into, which is now sought to be inquired into. I ask your lordships whether, either in the Constitution of John Peckham, or the Constitution of Othobon, or the gloss, there can be made out, that there was an inquiry there to be set on foot, in respect of unsound doctrine of the person chosen. Of course these Constitutions were ages before the statute of Hen. 8; they were in the time of Hen. 3.

Well then, my lords, my learned friend, having failed, (I presume he may have more authorities to bring, but having failed), upon that occasion, to find authority sufficient, in the English canonists, to guide us in the matter, (if we are to be guided by them), was obliged to go out of the English canonists and take the writers of other countries, as near the time of Hen. 8 as he could. He took therefore *Lancelottus* (*u*), a man who was, I believe, under the in-

Lancelottus.

(*u*) "*Lancelot* (Jean-Paul) jurisconsulte célèbre à Pérouse dans le XVI. siècle, composa divers ouvrages, entr'autres celui des Institutes du droit canon, à l'imitation de ceux que l'empereur Justinien avoit fait dresser pour servir d'introduction au droit civil. Il dit, dans le préface de cet ouvrage, qu'il y avoit travaillé par ordre du pape [Julius III., crowned 22 Febr. 1550, d. 5 March, 1555], et que ces Institutes furent approuvées par les commissaires qu'on avoit députés pour les examiner. . . . Il mourut à Pérouse sa patrie, l'an 1591, âge de 80 ans." *Moréri, Dictionnaire Historiques*, in loco. See also *Taisant, Les Vies des plus célèbres jurisconsultes*, 332 (Paris, 1737).

"To most editions of the *Corpus*

Juris Canonici is appended the *Institutiones Juris Canonici* of Lancelotti. This work, first published in 1563, a few months before the dissolution of the Council of Trent, has never received official sanction, although it was undertaken with the approbation of Paul 4, and, by the permission of Pius 5, obtained a place in the *Corpus*. From its resemblance to the *Institutes* of Justinian, it completes the analogy between the *Corpus Juris Civilis* and the *Corpus Juris Canonici*. This is an interesting and well-written little treatise, and its value is increased by the excellent notes of Doujat (Paris, 1685, and Venice, 1740)." *Encycl. Metropol.*, vol. 2, p. 787; *Art. LAW*, ch. 4, by Professor Graves.

fluence of Pope Paul IV., a person to whom we Englishmen have no great reason to be well disposed, for the imputation which he cast upon the birth of Queen Elizabeth.

Mr. Justice COLERIDGE. With respect to Paul IV., I do not recollect exactly his time (*v*). He is not the Pope who held the Council, is he?

The *Solicitor General*. My lord, he was contemporary with Queen Elizabeth.

Mr. Justice COLERIDGE. Paul III. held the Council (*w*).

The *Solicitor General*. My lords, my learned friend read from *Lancelottus, Institutiones Juris Canonici*, from the first book, a passage which comes early in the title, "De Confirmatione Electionis." It comes in the third section. "*Non confirmatus non potest res ecclesiæ administrare.*" The section goes on: "Quamdiu autem quis confirmatus non est, rerum ecclesiasticarum administrator esse non potest. Quòd si negotiis ecclesiæ, ad quam vocatus est, sese temere ingesserit, omni jure, quod ei per electionem quæsitum fuerit, statim privandus erit: nullo neque æconomatûs"—(I do not know what word that is; it is some kind of steward or receiver, I suppose) (*x*)—"nec procurationis prætextu excusandus." My lords, I have no objection to that passage: it seems to me that no person can be a bishop without being confirmed; but it precedes the passage "*Confirmatio non conceditur, nisi cum causæ cognitione.* Is autem ad quem confirmatio pertinet, diligenter examinare debet, et electionis processum, et personam electi." (No doubt, this is the passage upon which, of all others, they most rely). "Est enim hoc generale, ut ad eum pertineat examinatio, ad quem manûs impositio spectat. Et cum omnia rite concurrunt, tunc munus ei confirmationis impendat. Quòd si secus factum fuerit, non solùm dejectendus erit indignè promotus, verùm etiam indignè promovens puniendus." Now, my lords, those are the words that you find in many of the books; and you have the glosses of many wise men upon them. I am curious to have the gloss of *Lancelottus* (*y*) upon them. My learned friend did not read that gloss: it probably was not in his copy. But it is said, if your lordships will please to remember, "ut ad eum pertineat examinatio, ad quem manûs impositio spectat. Et cum omnia rite concurrunt, tunc munus ei confirmationis impendat." Now, what is the gloss upon the word "impendat?" "Hodie,"—that is, in the time of Queen Elizabeth—"hæc confirmatio non est necessaria." (This is by *Lancelottus*:—"Hodie hæc confirmatio non est necessaria"). "Papa enim sibi reservat potestatem super omnibus dignitatibus, solet tamen de gratiâ electos confirmare ut per"—and then he gives a reference, my lords, which I cannot refer to—"ut per Abb. in cap. nihil. de

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(*v*) Paul 4 was crowned 26 May, 1555, and died 18 Aug. 1559.

(*w*) Paul 3 was crowned 7 Nov. 1534, and died 10 Nov. 1549. The first Session of the Council of Trent was held on 13 Dec. 1545, and the last on 3 Dec. 1563.

(*x*) "ÆCONOMATUS].—"Æconomatus

est cui res ecclesiastica gubernanda mandatur."—Note of *Douyat*, Editor of the Paris ed. of 1685.

(*y*) P. 56 of the Louvain edition of 1578. The gloss of *Lancelottus* himself is not given in the Paris edition of 1685.

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elect." (z). It would seem therefore, that the very person writing upon this part of the institutional law, was himself of opinion that confirmation was not necessary; nay, that the Pope sometimes "*ex gratiâ*" performed it. Then what is the meaning of this? Are we to take it as conclusive authority,—are we to be satisfied with the authority of *Lancelottus*, that the confirmation, when it does take place under these circumstances, must be so performed; seeing that in the same breath he tells us, that it is a thing which may be dispensed with altogether? And it is my argument, that if the Pope could dispense with this sort of thing,—could do it or relax the confirmation,—why then, the Pope's authority is in the crown: the crown can allow the bishop elect to be confirmed; it can command the archbishop, who confirms him, to confirm him after a certain manner; nor are we to look at the old canonists, to find that (not in the manner contended for, but in some other manner), the ancient mode of confirmation must obtain. My lords, it seems to me, that this quotation from *Lancelottus*, if the gloss is as good as the text, is good authority.

Lord DENMAN. The *Attorney General* mentioned (a), and I believe it is stated in the preface, that the Pope never sanctioned the doctrine of *Lancelottus*; probably on account of the passage which you have now read.

The *Solicitor General*. I am aware of that, my lord. But, even were it otherwise, the state of things contemplated by *Lancelottus* was totally inapplicable to the present case. Why, in the very same passage,—I mean not in the gloss, but in the substance,—in the body of the work,—it appears that the writer refers to another state of things altogether, and not to the case of a bishop coming to be confirmed, who was avowedly and allowedly the person to be confirmed. "*Quòd si fortè eligentium vota in duas se diviserint partes, is confirmatoris judicio alteri præferendus erit, qui majoribus juvatur studiis et meritis.*" So that, in that case, the person confirming was to inquire into the studies and merits, the zeal and qualities, of the particular candidates.

My lords, from the same book, my learned friend cited another passage, with a gloss to it, the title of which is, "*In confirmatione faciendâ citandi sunt, quorum interesse potest. Et calumniöse opposcentes puniuntur.* Illud etiam confirmantem observare oportet, ne, dum nimia in confirmando celeritate utitur"—(you remember, my lords, that the archbishop is charged to use a great deal of celerity in his work (b),—the very converse of this)—"contra

(z) In capite *Nihil. De Electione*. The old method of citing the canon law. The reference is to the Decretals of Gregory 9, in the *Corpus Juris Canonici*, book 1, tit. 6, c. 44; the subject of the title referred to being "*De Electione*," and the first word of the chapter, "*Nihil.*" "*Abb.*" refers to the Commentaries on the Decretals, by *Nicholas Tedeschi*, a native of Sicily, and one of the most celebrated canonists of the 15th century. In 1425, he was made abbot of

a Benedictine abbey at Palermo, and afterwards archbishop of that city. He is spoken of, or referred to by canonists, sometimes as "*Abbas Panormitanus*," sometimes as "*Abbas Siculus*," and sometimes simply as "*Abbas*:" under the last-mentioned designation by *Lancelottus*, who cites him very frequently throughout his gloss.

(a) *Supra*, p. 127.

(b) 25 Hen. 8, c. 20, s. 5.

doctrinam Apostoli, proprium affectum juri et æquitate præponat. Itaque si coelectus aliquis, vel contradictor apparet, ante confirmationem nominatim vocandus est: alioqui si nemo apparet, in foribus ecclesiæ, in quâ electio facta est, generaliter edicendum erit, ut si qui sint, qui confirmationi futuræ velint opponere, ad contradicendum in assignato peremptorio termino, præsentibus esse debeant. Quæ omnia locum habent, sive concorditer electio fuerit celebrata, sive non. Sciant tamen ii, qui contra electionem opponendum duxerint se, si probationibus destituti fuerint, ab omni pœnitentiæ præsidio exclusos, legitimis pœnis esse subjiçendos." With this passage of course we have something to do. In the former passage, if it applies, we have to see whether the person who is to confirm ought not "examinare et electionis processum et personam electi." Here, we are to see, whether or no we must not cite those parties who have an interest in the matter. Now, my lords, this passage will raise very serious doubts and differences, in the way of any view which the present opposers ask your lordships to lay down for them, as to the right of opposition. When my learned friend, in answer to what fell from the Bench, said, that some of these gentlemen lived in the diocese (*c*), it was supposed that that at once was a sufficient interest to enable them to come in and oppose. My lords, I do not know whether any man in England has not an interest to come in and oppose. What is the qualification? Will you deny persons who are not in the church? Will you lay down, or can you lay down, from the canonists, any rule as to who those interested parties are, who have a right to come in, as they say, and be heard? My lords, what difficulties would not arise in such a case? The clergy of one particular view might say, We are interested: we are not in this diocese, it is true; but this gentleman may be translated to our diocese: having been once confirmed for your's, he need not be confirmed again; and we shall have no other opportunity of opposing him. Why should not we go in, *quia timemus*? Because it is an everlasting injury, if it be an injury such as ought to be redressed; therefore they would seek to come in. Are lay members to come in? Why should they not? A layman is as much a member of the church as a clergyman: why should not he come in? And if you allow a layman to come in, will he not insist upon his right to be heard, equally, though he be not of the church? I see endless troubles and controversies to arise, if your lordships open this door. Supposing an avowed enemy of the church comes, a person, who, in the language used here, is not a *coelectus*, but a *contradictor*,—a vexatious, turbulent fellow,—supposing he comes and says, I insist on being heard; and I insist on being heard, because I do not love your church or your ways; and I take this opportunity to shew it, and I will prove it by a trial of doctrine: is he interested to be heard? He pays church rates; he has other duties which call upon him, as a subject of the crown, to stand by the laws of the realm; has he no right to be heard? My lords, all and every one of these would claim to be heard in the hour of trouble. They would come, perhaps, only when there was some difficulty in the

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wind; or they might seek to gain some credit or advantage from troubled times.

Then, my lords, is it sufficiently settled by the canon law, who are interested in coming in? Will your lordships lay down the rule, for the first time, that these gentlemen, who are now the opposers, are so interested, that without doubt, by the canon law, they have a right to come in? You must go to the canon law for it. "Interesse," means something: what does it mean, in this case? Were they persons living in the diocese who were meant? Were they persons sent there by the Pope, or by some particular person? One cannot tell who they might be. But, my lords, without knowing who they might be, or who they are, you have to seek in the canon law for the interpretation of "interesse;" and I am almost positive that you will not be able to find it. My lords, will you commit to these oppositionists the power which they seek, unless they bring themselves closely within the meaning of the canon law?

Well then, my lords, but supposing a man be sufficiently interested, in your lordships' view, to come in and to oppose, what is he to oppose? *Processum electionis*? No: by the statute that is positively against him: he shall not do that. But there must be a *causæ cognitio* before the archbishop, when he confirms; and the evidence he receives by the proctor for the dean and chapter. My lords, Bishop *Gibson* uses remarkable language. Remember who Bishop *Gibson* was: so high-church was he considered as a writer, that even Charles Butler, the Roman Catholic, warns readers of his book to take care how they read Bishop *Gibson*; whom he describes, in his list of authors, as a good writer, but very high-church in his practice (*d*). My lords, I believe that Bishop *Gibson* knew very well what we have been talking about to-day: he knew it; but he did not know at all how to use it for the purpose of shaking the practice of the time; nor for that purpose only, but also for upsetting the act of parliament under which the prerogative of the crown was exercised. My lords, Bishop *Gibson* here refers to this very expression of *opposers*. "*Citatio contra oppositores*," . . . "omnes et singulos oppositores (si qui sint) in specie, aliquin in genere, qui contra dictam electionem, formam ejusdem, personamve in hac parte electam," &c. (*e*) Let me call to your lordships' recollection first, how he says that the *cognitio causæ* is given to the confirming archbishop. My lords, he recites the "*summaria petitio*," and the several articles contained in it: one of these articles, the 6th, is the character given by the electing body, who have elected the bishop, whose election stands good,—the character which the dean and chapter give of the man whom they present: (it is not a bishop presenting himself; it is they, who in the eye of the law have elected him, that present him as a good and proper person, whom, by virtue of the king's letter missive recommending them to elect a good and proper person, they have elected). My lords, let me

(*d*) "The works principally used in framing this account [of the canon law] are, Bishop Gibson's learned, but very high-church Preface

to his *Codex Juris Ecclesiastici Anglicani*." Butler's *Horæ Juridicæ Subsecivæ*, 133, n.

(*e*) *Codex*, 110, n. r.

read the 6th article (*f*). My learned friend, Sir *Fitzroy Kelly*, called the attention of the court to it, as if it must make against our case: it makes all for it; for it shows that these gentlemen who have elected the bishop, in pursuance of the law, and the queen's command, have elected the man whom the queen, who was the judge of it, thought a proper person for them to elect; and their election is to stand good against any opposers whatsoever. My lords, the "*summaria petitio*," I say, contains this 6th article. This is the language spoken by the dean and chapter, my lords, not by the bishop himself, nor by his friends. The dean and chapter, intrusted with the royal prerogative, or commanded by the royal power to do this thing, have done this thing; and here is the testimony of their work. They come and say, "Here is our man. In the first place, we tell you, my lord archbishop, the see is vacant; we tell you, we received the royal licence, appointed a day for election, and summoned all persons; and on that day, we tell you, we unanimously elected this man." That is what they say, knowing the *Congé d'élire*, knowing the letter missive, knowing the whole ceremony under which they have proceeded to elect. Then they say, that the election was duly published and declared to the clergy and people there assembled; that, at the request of the dean and chapter, the person so elected gave his consent to the election. And here is the 6th article: "*Fuit et est vir providus et discretus, ac sacrarum literarum doctrinâ et scientiâ sufficienter imbutus, necnon vitâ et moribus meritò commendatus, liberæ conditionis, et de legitimo matrimonio procreatus, atque in ætate legitimâ, et in ordine [presbyterali or episcopali] constitutus, necnon Deo devotus, et ecclesiæ memoratæ apprime necessarius, ac Domino nostro Regi, ejusque regno et reipublicæ, fidelis et utilis.*" This is what they have done, upon the recommendation of the sovereign, who told them to take a man who is all this. They present this man, and none other, to the archbishop; and they ask him to do his part of duty, in obedience to the royal authority, as they have done theirs, in respect of this new bishop elect. Well, my lords, then they go on, and say, that they have intimated the election to the king, that the king has given his royal assent, and that he has, by his letters patent, required the person elected to be confirmed; and then they pray that, in pursuance of the premises, confirmation may be decreed. Now what says Bishop *Gibson* upon this? Is it not very remarkable that, in the *Codex Juris Anglicani*, if there was such a right as this always lying by, he did not rake it up, that he did not tell us what are the rights of persons who are interested; that he did not proclaim it in a text-book, which was to guide the church of England and the people of England? Why did not he tell us, that this was an occasion when *oppositores* might come in and object, both to the election, and also to the *persona electi*? But what does he say? It is incredible, if he meant that there should be a positive objection made, *bonâ fide*, by honest and true men, lovers of their church, and lovers of their country,—it is incredible that, upon this occasion, he should use these milk and water words, and leave us, or leave

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any one, to hazard a doubt that there was a time when all those opposers might come in. My lords, I quote Bishop *Gibson*: he was one of the most eminent of men. I said before that he was a high-churchman. But he was a most eminent divine; he was a man of very great learning. Now see what he says, accustomed as he was to write;—see what he says, “Then the *summaria petitio* is admitted, and the court decrees to proceed *summariæ et de plano*, and assign him a term *ad statim* to prove the particular matters contained in the petition; for proof of which, he exhibits the process of the election made by the dean and chapter, the consent of the archbishop, and the royal assent, and then prays a time, *ad audiendam sententiam sive finale decretum*, which is assigned *ad statim*.”

My lords, the next step, says Bishop *Gibson*, is the *schedula secunda*. “A second *præconization* of the *oppositores* (if any be) is made, *ad fores exteriores ecclesiæ*, and (none appearing) they are declared contumacious by a second schedule.” Does any man alive believe that, if he supposed it could be real and *bonâ fide* opposition, the writer would not have said so? My lords, I cannot read this with the eyes which I have, and not see, for certain, that the bishop knew all this was mere sham. Why, his duty would have been to have instructed people what to do. His business was to lay down the law. No man knew it better. We refer to him, as to our fountain to drink from; and what do we find? We find, in other cases, enough of light to guide us: why should we not have it here? Then the oaths are taken; and then sentence is given, “or the act of confirmation, by which the Judge commits to the bishop elected *curam, regimen, et administrationem spiritualium dicti episcopatus*.”

Now, my lords, I have said, “for proof of which.” The schedule contains not only the fact of the election, but the *persona* of the man. I observe that, when the rule was moved for, it was intimated that perhaps *persona* meant individuality (*g*). My lords, I do not know that that can be the proper meaning of it: I neither admit nor deny it. The archbishop has *causæ cognitio*; therefore he must know what he is about: he is there to do something; there is the *negotium* to be performed, which calls him there: so that the next question is, What am I to do? What are you to do? Why, you are to inquire according to the canon law: you are to inquire into the process of election. Well then, I have done that, because here is the process of election: the proctors for the dean and chapter have brought me the process of election, and it is all right; and so is the proof of it, which they have tendered me. Then, they say, my lord archbishop, there is another thing that you must inquire into: you must inquire into the *persona* of the man. The archbishop says, That is found for me: the crown has found the *persona* of the man; and it is certified by the dean and chapter. That is the evidence before me. I have not to call upon A. or B. from distant countries to come in and prove the case; but I have to say, this *persona* is the *persona*, the very individual, who is named, and who, in quality and in consideration, is the person who is articulated in

number 6 of this *summaria petitio*. My lords, am I forcing it too far? I say that, upon Bishop Gibson's own language, proof of that is tendered. *Proof* is a stronger word than *evidence*: it may sometimes be, and it sometimes is used in a similar sense; but I think here, finding the word used in the place where it is, in describing the course and order of proceeding at confirmation, one must believe that he, who knew that these two were the only exceptions the canon law allowed, was not prepared to say, that by the law of England they could be taken in this way.

There have been constructions by the canonists put upon this term *persona*. There is a threefold meaning attached to it, which we find laid down in several places, amongst others in *Van Espen*, which, I understand from civilians, is a book of great authority, as it is of immense industry. He says, my lords, in the same book which I quoted, *Jus Ecclesiasticum Universum*, part 1, tit. 14, *De Confirmatione Episcoporum*, c. 5, "Examen, seu informationem esse faciendam, non tantum circa electionis processum, sed etiam *personam electi*, declarat citatum Lateranensis Concilii sub Innocentio Tertio Decretum." Now, my lords, I had made it out that that would be the fourth Council of Lateran, in 1215; but I have been told, by much better authority, that it is not that, but that it was another Council, whose orders were never admitted into the canon law. I am informed it was in 1179 (*h*).—Then I am wrong. At all events, that is ten years before the time of legal memory; it is just ten years before the second return of King John (*i*). "Et quidem quod tria præcipuè inquirenda sint in persona electi, videlicet, ætas legitima, morum honestas, et literatura sufficiens, scribit idem Innocentius Archiepiscopo et Capitulo Capuano." My lords, here there is a question, if the "*persona*" was not sufficiently proved by the dean and chapter. There was the *negotium*, and the *processus electionis*; and if his *persona* was not sufficiently proved, so as to stop all opposers, by his being the nominee of the crown, and the accepted of the dean and chapter, the bishop elect at the time, what is the meaning of these three terms which are *præcipue* to be inquired into? The age—we have no question of that: the statute law seems to regulate the thing in this country (*j*). "*Morum probitas*"—that is not a question of doubt; for I say, "*morum probitas*" is found as a verdict; it is found by the dean and chapter under their seal. Then comes the question as to "*sufficiens literatura*:" does that mean, my lords, soundness of doctrine? Is it not more like those terms which are found in the letter missive which I have read, which your lordships will find in the letters patent directed to the Bishop of Westminster (*k*), and which show the person, in the opinion of the crown, to be a man learned and having qualifications which go, in respect of education, to fit him for the high office he is appointed to? Now, no other qualification whatever, except in respect of the "*literatura sufficiens*," is to be considered in this *persona*. My lords, I believe in fact that the word "*literatura*" is a

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Van Espen.

(*h*) When the third Lateran Council was held, under Pope Alexander 3.
(*i*) 20 Hen. 3, c. 8.

(*j*) *Supra*, p. 171.
(*k*) *Supra*, p. 174.

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Variety of forms pursued in confirmation in different places at that time.

No certain rule of confirmation shown.

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word of a special age, and it may have different meanings. But this I know also: if your lordships will look in the same page of the book, whatever notion may be taken of the subject of inquiry, (and, I say, none earthly can be taken of it, by reason of the *processus electionis* being by statute law untouchable), that it comprises the personal qualities of the man, as well as the whole steps of the election; and that being so, that there cannot be any further investigation into that matter. But, my lords, not a word of that can I find in Bishop *Gibson*. Can any man doubt, if Bishop *Gibson* intended to distribute the meaning of *persona*, and to tell the church of England, and the people for whom he was writing, that in truth it meant something more than the individuality of the person, that he would not have done so.

My lords, there is a passage in the same page, upon another subject; which seems to me to refer to the occasion. *Van Espen* is giving an account of the different modes of confirmation in different parts of the world. You remember, my lords, that at the time when this was written, (the period of the Council of Lateran), in the church there would not be, among the persons who came to be confirmed, differences of opinion, as there are in the Protestant church. There was a pretty straight line drawn: a man, I take it, was either a member of the church of Rome, or he was a schismatic. I take it, there were very few opinions allowed at that time. Belonging to the Eastern and the Western Churches I can understand: but if you come under one particular church, I apprehend, that the rule would be, that the man that came to be confirmed, came as a member of the church. But, my lords, just see what is said here: "*Firmum itaque et constans semper fuit, confirmationem episcoporum non esse leviter annuendam; sed serium tam super qualitatibus electi, quàm formâ electionis examen esse præmittendum; quamvis ritus hujus examinis et confirmationis, pro temporum et locorum diversitate, varius fuerit.*" I have no doubt it must have been so: the innumerable dioceses, into which the church was divided, probably varied in some respects in a mere ritual: I do not know, but it is to be assumed, that it was so.

My lords, I have almost done; and I will trouble your lordships with but one or two more observations. I say that they have not shown to your lordships, in the canon law, any certain rule to which we are to conform. But even if they have, I say, it is inapplicable to the present case, because it is in restraint of the prerogative royal of the queen. And that throws me back upon what Bishop *Gibson*, in the preface (*k*), says, the canon law would

(*k*) "As the reasonings upon ecclesiastical matters, when they chance to come before the temporal courts, must (in the nature of the thing) proceed chiefly upon ecclesiastical rules, if they will speak pertinently to the point in hand; so the common law of the Church of England, and the knowledge thereof, must needs remain very lame and imperfect, unless it be supported, explained, and improved, from

authentic rules and proceedings of the same church; such, especially, as are founded upon the authorities of Lyndwood and John de Athon (our English canonists), and such as are demonstrated to be common law, by the undoubted records of our own church. And even these two, when added to the judgments and declarations of the temporal courts, will be found in many cases a defective rule, unless (where

have done for me, but which I am quite content to take under the statute of Henry 8, because it was made at the same time, and it was made with a view to keep down the encroachment of the Pope, and to destroy the influence of the canon law in the realm. Therefore I will see what the statute, made at that time, says, and whether the enactment of it does not apply to the case in hand. "Such canons, constitutions, ordinances, and synodals provincial, being already made, which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the king's prerogative royal" (1), shall stand. I pray your lordships is not what is sought for by the opposers in restraint of the prerogative royal of the queen? She has chosen (for it is idle now to talk about the dean and chapter's choice: that we know was really nothing at all; but the queen, by virtue of her royal prerogative has chosen) a man sufficient in learning and good morals, and, for all the purposes required, a proper person for her majesty, in her royal wisdom, to appoint. She has appointed him; and she has commanded the archbishop to confirm the bishop elect. Is it not standing to common reason, that he who lays to his hand, for an instant, to stop that confirmation, is "*letting*" the queen's prerogative royal? Can any person doubt that if, by the course taken by these opposers, the choice of the dean and chapter (which is the choice of the queen) cannot be carried into effect, or the archbishop, within his twenty days, cannot confirm,—can any person doubt but that that is a damage and a hurt to the prerogative of the crown? My lords, I cannot imagine that it shall be said, because there is some canon law applicable to the act of confirmation, that it is to override the authority of the queen, which is exercised under an act of parliament. I cannot understand how it comes to pass, that any person in the realm can say, he is of right entitled to oppose a confirmation, which the crown of England commands to be made within twenty days, and yet is doing nothing in restraint of the prerogative of his royal mistress.

My lords, what is the archbishop to do? Perhaps your lordships will not look to consequences. Perhaps your lordships will only consider the present and positive duty, whatever it be, that lies upon him. But you must construe this statute, with all favour to the rights of the queen, and to the duties of the archbishop. It is monstrous to suppose that an opposition, such as this, by any conceivable process in the courts where it could be tried, (if it

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The Solicitor General's argument. the statute and common law.

Impossible to complete the confirmation

they are wholly silent or obscure) we take in the light that may be had from the *Body of the Canon Law*, which, till the time of the Reformation, remained a rule to the Church of England, and, being received by long practice, remains so still, as to such parts of it as are not inconsistent with the laws of the land. Upon that foundation, and under this restraint, it passes current in the proceedings of the spiritual courts; and much more may it be admitted, as such, into a

work of this nature, where it is mixed with the statutes of the realm, and the laws and practice of our own national church, and therefore gives a double security not to break in upon the laws of the land, or, if it does, is placed in such a light that it cannot remain long in disguise, but must be easily discovered by those infallible tests that attend it."—*Preface to Gibson's Codex*, p. xiv.

(1) 25 Hen. 8, c. 19, s. 7.

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General's ar-
gument.

within the sta-
tutory period,
if inquiry be
permitted.

A fair trial
unattainable.

Sum of the
argument.

can be tried in such courts), could be proceeded with within the term of twenty days. I defy my learned friend who came from the quarter where these things are best known and done, to provide us a mode how under heaven this trial (for it must be a trial), shall be speeded, so as to be finished within the twenty days. And, my lords, if it be a trial, how unlike it would be to the trials which ought to be in England. Here is a charge made against a man, without notice beforehand. Here is a charge, depending upon evidence which the court that tries it has no authority to enforce. Here is a charge, which the bishop himself may not be called upon to take part in. My lords, it is not the bishop against whom these gentlemen have protested, but it is against the archbishop's work that they protest. They say to the archbishop, You shall not proceed: we know the law of the land, and tell you, that the queen, though she commands you, by her letters patent, to proceed with the work of confirmation, means no such thing; though the statute tells you of pains and penalties and *præmunire*, it means no such thing; the whole matter, from beginning to end, is with us; we know what was in the head of King Henry 8, in the breast of Cranmer, in the mind of the bishops of all England from that time to the present, better than you; upon the right which we assert, we are here to take our stand; and we tell the church of England, and the people who belong to it, that we know a way whereby the queen's prerogative, from time to time, shall be let and hindered and restrained, in a matter going to the very heart of the peace of the country; we stand upon *Otho* and *Othobon*, and *John de Athon*, and *Lyndwood*, and *Lancellottus*; and we tell the queen herself that the laws of England, in comparison of them, are but as dust in the balance.

Mr. Hill's
argument.

Mr. Hill. My lords, having regard to the very great importance of this case; and bearing in mind that your lordships have granted the rule, and that the court calls upon those, who show cause against it, to convince your lordships, beyond doubt, that a mandamus should not issue for a more full examination; I think myself justified in offering some observations to your lordships, notwithstanding the length to which the argument has already been prolonged. And, my lords, I begin with that statute, upon which it appears to me, that the whole matter turns. My learned friend, Sir Fitzroy Kelly, began by calling your lordships' attention to the title of the statute as being "an act for the nonpayment of first fruits to the Bishop of Rome" (*m*). My lords, I am surprised that my learned friend wasted a moment of time upon the title of a statute, which has been frequently determined to be no part of it (*n*); but, most assuredly, the propriety of that rule was never more completely shewn, than in comparing the statute which is before me, with the title which I have just read.

The title of
the stat.
25 Hen. 8, no
part of the act
itself.

The true
object of that
act was to vest
the entire

Lord DENMAN. If you compare the title in the *Statutes at Large*

(*m*) *Supra*, p. 103.

(*n*) See *Dwarrris's General Treatise*

on *Statutes* (second edition), 501, and the authorities there cited.

with the title in *Gibson* (o), they appear to be different. That in the *Statutes at Large* (p) refers to annates: that in *Gibson*, only to the making of bishops.

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Mr. Hill. Exactly, my lord. And I was about to say, that a higher authority than even *Gibson* is in my favour; for if your lordships refer to 8 Eliz. c. 1, an act which was made to allay doubts, and which begins "Forasmuch as divers questions, by overmuch boldness of speech, and talk amongst many of the common sort of people, being unlearned, hath lately grown, upon the making and consecrating of archbishops and bishops," your lordships will there find that the act is called, what it really is, an act laying down the order and course of election. I refer your lordships to 8 Eliz. c. 1, "An Act declaring the making and consecrating of the archbishops and bishops of this realm to be good, lawful, and perfect." The second section commences, "First, it is very well known to all degrees of this realm, that the late king of most famous memory, King Henry the Eighth, as well by all the clergy then of this realm, in their several convocations, as also by all the lords spiritual and temporal, and commons, assembled in divers of his parliaments, was justly and rightfully recognized and knowledged to have the supreme power, jurisdiction, order, rule, and authority over all the estate ecclesiastical of the same, and the same power, jurisdiction, and authority did use accordingly: and that also the said late king, in the five and twentieth year of his reign, did, by authority of parliament, amongst other things, set forth a certain order of the manner and form how archbishops and bishops, within this realm, and other his dominions, should be elected and made, as by the same more plainly appeareth."

Mr. Hill's argument.

appointment of bishops substantially in the Crown.

8 Eliz. c. 1.

Lord DENMAN. That is not the title. However, it appears as if every body might give his own title, according to what he wanted the act of parliament for. It is not worth while to pursue that.

Mr. Hill. Yes, my lord. But I cite this as very material, in another point of view, which is, for the purpose of showing what, I humbly submit to the court, is the true view of this statute; namely, that it is a code of rules and regulations, imperative upon the election of bishops.

Lord DENMAN. You must look at the act itself: the title cannot get rid of the enactment. It says, because the order of electing archbishops and bishops is left imperfect, now we proceed so and so.

Mr. Hill. Exactly, my lord: that is the preamble of the second section.

Lord DENMAN. The preamble to this part of the statute.

Mr. Hill. Yes, my lord. And what I submit is, that it gives a complete set of rules for the election; and your lordships will look for the election and choice in the making of bishops, to this statute, and to no other authority antecedent. If the statute has been modified by subsequent authority, so be it; but to no antecedent authority can your lordships look, for any rules and regulations. It

(o) Viz. "An act — of the electing and consecrating of archbishops and bishops within this realm."

(p) *Supra*, p. 52, n. (k).

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argument.

2 & 3 Edw. 6,
c. 1; 3 & 4
Edw. 6, c. 10.

Confirmation
an act purely
ministerial.

is, as it were, the Grenville Act(*p*), with regard to bishops; it is that which regulates the election and the making from beginning to end.

Mr. Justice COLERIDGE. The difficulty seems to be, that this statute does not say one word about any qualifications of any kind or sort.

Mr. Hill. No, my lord: at that time, the whole qualification was left to the crown.

Mr. Justice COLERIDGE. Then the statute does not give it?

Mr. Hill. No, my lord: it does not give it.

Mr. Justice ERLE. The bishop is the nominee of the crown. The crown, in case of failure of election, is to nominate such person as the crown shall think "able and convenient"(*q*). I believe those are the words.

Mr. Hill. Those are the words, my lord. That is to say, it is not to be intended that the crown would nominate improper persons: but who were proper, and who were improper, was not provided for, against the crown, so as to limit its authority; but the whole matter was vested in the discretion of the crown, as it had formerly been. Then afterwards, in the reign of Edward 6, as it seemed to be thought that this was too great a power to leave irrespective of the qualification of the persons chosen, an express act was passed, making the statutable age for a bishop thirty years(*r*). And therefore it was, my lords, that I said that, with regard to antecedent authority, your lordships have, as it appears to me, nothing to do with the matter: you are not required to look into the question, as it existed before the 25 Henry 8.

My lords, that being so, your lordships will, I am sure, bear in mind, that this principle runs through the act; that every successive step is treated as necessarily following from the precedent step; that when the *Congé d'élire* and the letters missive are sent down, the words of the statute are not merely, that they shall elect the nominee of the crown, but add, that they shall not elect any other man: and the election pursuant to the statute, is said to be good to all intents and purposes. Then, my lords, it goes on, in perfect consistency with that view, to say that the bishop elect shall make oath and fealty to the crown; and, that being done, the crown is to send a mandate to the archbishop for the confirmation of the bishop elect. My lords, let me pause there one moment. The bishop is to do an act, which shows his consent to the election, by coming in, and taking the oath of fealty to the crown, in respect to this new election. That being done, all is done that is necessary in the matter: everything else becomes purely ministerial. Then your lordships will not forget to look carefully to the words which relate to the confirmation. The words are not, that the archbishop shall proceed to examine whether or not the election can be confirmed; whether or not it is a valid election; and, if it be a valid election, that then he shall proceed to confirmation of such election. But the archbishop is called upon to

(*p*) 10 Geo. 3, c. 16, "An Act to regulate the trials of controverted elections, or returns of members to

serve in Parliament."

(*q*) 25 Hen. 8, c. 2, s. 4.

(*r*) *Supra*, p. 171.

confirm ; and there is not, for one moment, the slightest allusion to the possibility that he can have any other duty to perform, than to confirm. My lords, if it be true that he is to be put in a judicial position ; that he is to try the question of a controverted election ; that he is to say, whether the election be good or bad ; how is it possible that the words of the statute could have been as they now are ? Would it not have said, that he is to confirm the election *if valid* ? And would it not have gone on to give directions as to what should take place, if the election were invalid, and if, therefore, the archbishop did not confirm ? Why, my lords, would not it have been monstrous, to have put into one mandate an express direction to confirm and to consecrate, if there might be neither confirmation nor consecration to perform ? If, upon the examination precedent to the confirmation, the archbishop were to find that he could not confirm, but that the election was invalid, for the want of the due qualification of the candidate, or for any other reason, would it not be monstrous that he should be instantly called upon, under the pain of *præmunire*, to confirm ? My lords, it is almost, I would say, (I say it with great respect on all sides), playing tricks with one's reason and intellect, to suppose that, at any time, an act of parliament, which really meant that there was a judicial function to be performed by the archbishop, should have been couched in these words. The act indeed would then be, what it is supposed,—but, no doubt, mistakingly supposed,—to have been called by one who owes all his honours and dignities to this very act of parliament, the Magna Charta of tyranny (*s*): it would be as if you told a judge, you must act as a judge; you are engaged in a judicial function; but, if you do not arrive at one given result, you are subject to the pains and penalties of *præmunire* !

My lords, I would ask your lordships, if there is the slightest semblance of a judicial act ? Is there any qualification as to the *præmunire* ? Do your lordships find one single word in the statute, which will excuse the archbishop from the *præmunire*, though he may be convinced that the disqualification of the kind which has been supposed, and which is now urged against the bishop elect, really exists ? My lords, in any proceeding upon a *præmunire*, could he plead that ? Could he produce this statute in his favour ? Would he not be instantly told, this is not a judicial function ; you are not engaged in your judicial office ; it is a ministerial function ; you were acting ministerially ; and you disobeyed an act of parliament ? My lords, this is well known in our law ; that officers, who in general exercise quasi judicial functions, are, under certain circumstances, even when the act of parliament is much less stringent in its terms than this, held only to be exercising ministerial duties. Take the case, my lords, of a poor rate: the act (*t*) says, that the poor rate shall not be allowed but by the consent of the justices. I am not sure that it is in the negative ; but there is the word “consent ;”

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argument.

Analogy of
consent of
justices to
poor rate.

(*s*) This term was applied to the act by the Bishop of Exeter, in a letter addressed to Lord John Russell, dated the 10th of Dec. 1847, which appeared

in the newspapers about that time, and was also published separately, as a pamphlet, by *Murray*.

(*t*) 43 Eliz. c. 2, s. 1.

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Confirmation
merely a part
of election.

Trollop's
case.

Evans v.
Ascuithe.

1 Edw. 6, c. 2.

—it is to be allowed by the *consent* of two justices. By a series of decisions, this court has held, that those two justices have no power or authority at all, but that they must perform the ministerial act of allowing that rate: they are not to judge whether it is good or bad; they are not to judge whether the exigencies of the parish require the rate, or do not require the rate: they have a ministerial duty to perform, and they must perform it. Although, my lords, they are not set in motion by the crown, but by very humble officers of the country, by the overseers of the parish, yet still they are not supervising the duties of the overseers; and their allowance is a ministerial, though a necessary act; as confirmation is here, if it is preceded by an election, because the confirmation is part and parcel of the election. The election and the confirmation together constitute the *election*, sometimes so called in our books; as where Lord Coke says, in the *8th Reports*, in *Trollop's case* (*u*), that excommunication may be awarded by a bishop elect. Then, in the case, which has been so frequently referred to, and which no doubt will be frequently referred to again, of *Evans v. Ascuithe* (*v*), election is explained to mean election perfected by confirmation. And Lord Coke elsewhere says, that a bishop elect may sit in parliament; and that is again explained in *Evans v. Ascuithe*, to mean election perfected by confirmation. Therefore we find the two, election and confirmation, treated as one thing, or confirmation as the perfection of election.

Now, my lords, that, I apprehend, is the sense in which the word is used, in that important statute of Edward 6 (*w*); which, although it is now repealed, was a most important declaration, and parliamentary construction of the statute of Henry 8. Your lordships recollect that, in the statute of Edward 6, election is spoken of as a mere shadow, and is thus spoken of in reference to the power of the king; for it goes on to say, that the power is in the king, and the power ought to be in the king. Now, my lords, what was the meaning of the word "election," in the statute of Edward 6? Why, that meaning which has been given to it; that meaning which alone can be given to it, in common sense; that is, a perfected election. The books say, my lords, that upon the election by the dean and chapter, according to the old law, the bishop elect had only a name, and that not a name which had any operation in law: a writ to him, under the name of bishop, would not be good; and a writ which should be directed to him, in the name which he had before he was a bishop, would not be bad. That is laid down in this same case, where the authorities are collected, namely, in *Evans v. Ascuithe*. My lords, when the statute of Edward 6 uses "election" in that sense, what does it pronounce upon it? Why, that it is a shadow; that it is nothing; that it ought not to stand in the way; because it is a mere form, void of effect.

My lords, for some reason which historians have not explained or disclosed, when Elizabeth came to the throne, instead of repealing

(*u*) 8 Rep. 68 a.

(*v*) *Supra*, pp. 51, 107, and 146.

(*w*) 1 Edw. 6, c. 2. *Supra*, p. 138.

simply the statute of Philip and Mary (*x*), which had repealed the 25th of Henry 8 and the statute of Edward 6, she revived, as it has been held by the judges, the statute of Henry 8, by repeating it, *totidem verbis*, in the reviving act, or referring to it in very express terms, but did not revive the statute of Edward 6. My lords, perhaps that may be accounted for, by the great real power which popery had at that time in this country; and perhaps it was thought better to amuse the people with these old forms of elections, than to take that into the hands of the queen in form, which was clearly her own in substance, in principle, and in effect. My lords, I am led to such a conclusion for this reason, that that which she did not dare to do, or which, at all events, she refrained from doing, in England, she did in Ireland (*y*). Your lordships will find that in the 2nd of Elizabeth, in the parliament of Ireland, there is the statute of Edward 6, in so many words, except that "Ireland" is substituted for the queen's dominions at large: the expression, the declaration, that the election was a shadow, is preserved in the Irish statute; and every thing remains as it did in the statute of Edward 6, except that the statute of Elizabeth relates only to Ireland; whereas the other statute related both to England and to Ireland, and would have had operation in Ireland, just as much as it had in England, and in England, as it had in Ireland.

My lords, I have then, I apprehend, in the strongest terms, a declaration—a parliamentary declaration—a legislative declaration—that the statute of Henry 8, as it regards election (meaning, by "election," election and confirmation,) was a mere shadow. My lords, what a capricious interpretation do my learned friends call upon the court to give to the act, if they ask the court to consider it a substance and not a shadow. My lords, if the dean and chapter do not obey the exigency of the *Congé d'élire* and the letters missive, what is the consequence? First, they incur a *præmunire*. But what is the consequence, with regard to the choice of a bishop? Why, instantly the king nominates a bishop; and then, your lordships will find, by the very terms of the act, that there is no confirmation to go through; the nomination of the bishop being tantamount to both election and confirmation. I will read to your lordships the very words, if there is any doubt about it. "And if they do defer or delay their election above twelve days next after such licence or letters missive to them delivered, that then, for every such default, the king's highness, his heirs and successors, at their liberty and pleasure, shall nominate and present, by their letters patents under their great seal, such a person to the said office and dignity so being void, as they shall think able and convenient for the same; and that every such nomination and presentment, to be made by the king's highness, his heirs and successors, if it be to the office and dignity of a bishop, shall be made to the archbishop and metropolitan of the province where the see of the same bishoprick is void, if the see of the said archbishoprick be then full and not void; and if it be void, then to be made to such archbishop or metropolitan within this realm or in any the king's dominions, as shall please the

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Probable reason of the revival of the elective form by Elizabeth.

Direct nomination in Ireland.

Direct nomination in England, in case of failure by the dean and chapter to elect.

(*x*) 1 & 2 Ph. & M. c. 8.

(*y*) By stat. 2 Eliz. c. 4 (Ir.) *Supra*, 139.

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argument.

No confirma-
tion, in case of
direct nomi-
nation.

No confirma-
tion in Ireland.

king's highness." Then it goes on, my lords, in the 5th section:—"And be it enacted, that whensoever any such presentment or nomination shall be made by the king's highness, his heirs or successors, by virtue and authority of this act, and according to the tenor of the same, that then every archbishop and bishop, to whose hands any such presentment and nomination shall be directed, shall with all speed and celerity"—not *confirm*, but—"invest and consecrate the person." That is a very material omission, your lordships see; because the construction, which my learned friends contend for, would amount to this, that, when the dean and chapter do their duty, then there is to be an examination into the election of the bishop elect; but when the dean and chapter do not perform their duty, then there is to be no examination into the election of the bishop elect. Why, my lords, what is there in this, which is at all consistent with the confirmation, in any case, being more than a form? Supposing it to be more than a form, in case of the election by *Congé d'élire* and letters missive, then, my lords, we are to suppose that, in such a case as that, the bishop elect is to be subjected to this ordeal; but if (not by any merits of his, not by anything with which he has to do, but by the demerits of others,) the dean and chapter will not submit, but put themselves in a position which renders them subject to a *præmunire*, then the bishop is not to be examined; whilst, if they do their duty, he is to be examined! Really, nothing can be more absurd, it appears to me, (begging your lordships' pardon for using such a term,) than to suppose that this can be the true construction of the act; for it is quite clear, my lords, that upon a nomination from the crown, there is to be no confirmation. And if, therefore, upon the election, there is not to be this species of confirmation, then what becomes of the eloquent warning of my learned friend, Sir *Fitzroy Kelly*, who called your lordships' attention (z) to the dreadful consequences which must ensue, if these respectable, but somewhat obscure incumbents from the diocese of Hereford are not to be permitted to act as champions of the church of England, at Bow church? Why, says my learned friend, you may have a bishop elected, who has the most erroneous notions on the doctrine of the Trinity; nay, you may have an infidel elected a bishop. Why, my lords, that is the very sad state, in which the whole of her Majesty's kingdom of Ireland is, at this moment. If that be the protection of the bench of bishops; if the orthodoxy of the bench of bishops depends upon this crotchet, which has been raised into existence, by the misdirected learning of some of my learned friends; in what a miserable state is the whole kingdom of Ireland, at this moment! And surely, my lords, if either one of the kingdoms is to be taken care of in this matter, it is not England, where, fortunately, the church is triumphant, but Ireland, where she is only militant; where she is opposed by enemies, in the proportion of ten to one of her friends; where she has at once to fight against the Roman Catholics of the south, the west, and the east, and the Presbyterians of the north: and yet there she is left to the guidance solely of the queen, who merely acts under the casual

(z) *Supra*, p. 106.

direction of an obscure person, called her prime minister; and is deprived of the aid of the Rev. John Jebb, and Mr. Peter Somebody, who live in the diocese of Hereford,—most respectable gentlemen, I have no doubt, though I do a little doubt the necessity of their coming forward as champions of the church of England, in this case.

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My lords, after the statutory and legislative interpretation, put upon this statute, to which I have called your lordships' attention, any other authority might seem weak and inefficient. But I do beg your lordships' attention to one authority, to whom we are all in the habit of paying profound respect; I mean, the authority of Mr. Justice *Blackstone*. Conversant as that learned person was with the whole scope of the laws of England, I think I may appeal to your lordships, to confirm me in stating, that his great eminence lay in his knowledge of the laws, in their bearing upon the church of England. My lords, what I find in that learned person's *Commentaries* is this,—and I cite the passage from the edition of his most eminent editor (a), who does not append one word of dissent from the doctrine in the text. My lords, I find in the 1st vol. at p. 379, these words: "But by statute 25 Hen. 8, c. 20, the ancient right of nomination" (using the very word of the statute) "was, in effect, restored to the crown: it being enacted that, at every future avoidance of a bishoprick, the king may send the dean and chapter his usual licence to proceed to election; which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect: and if the dean and chapter delay their election above twelve days, the nomination" (still using the same word) "shall devolve to the king." So that he says, that the course of election by *Congé d'élire* and letter missive is, in effect, a nomination; and that, if it should fail, then nomination, in express terms, falls to the king. My lords, the learned Commentator upon the laws of England was not in the habit of using words carelessly or unadvisedly; but I find that this same doctrine is again laid down, to the full extent, in the 4th volume, in his celebrated chapter upon *Præmunire*. While I am upon the 1st volume, however, I will read a note which I find to that passage, which is in these words: "This statute, which was repealed by Edward the Sixth, but is held to have been constructively revived, and to be still in force, does not apply to the five bishopricks created by H. 8, subsequently to its passing; these are Bristol, Gloucester, Chester, Peterborough, and Oxford, which have always been pure donatives in form as well as substance." My lords, we find that certain persons, who seem to have a pecuniary interest in the writ of *Congé d'élire*, have issued *Congé d'élire* instead of the proper patent, and that the course of election to the new bishopricks has been, of late years at all events, just the same as it is in the old. But, beyond all doubt, the queen might to-morrow change that mal-practice, such as it is, and treat the new bishopricks as donatives; and then, not only does Ireland fall into the dreadful state which has been described by my learned

Blackstone.

English bishopricks of Henry 8th's foundation donative.

(a) Mr. Justice Coleridge.

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Canterbury.

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argument.

Bishoprick of
Mann dona-
tive.

The original
mode was by
direct nomi-
nation of the
Crown.

Blackstone.

friend, Sir *Fitzroy Kelly*, but a great part of this more happy and fortunate country itself. The state of the Isle of Mann, too, must be dreadful; because, until within a few years, the patronage of the bishoprick of Sodor and Mann was not even in the crown, but was in a subject exercising regal rights to some extent, and, among others, the patronage of the bishoprick. And, my lords, the bishoprick of Sodor and Mann was a bishoprick of the nature of a donative: there was no election, and consequently no confirmation (b). So that the purity, and excellence, and safety of the church of England appears narrowed more and more, and must be found only in those fortunate bishopricks, in which this shadow of election (to use the words of the statute) is still carried on.

Now, my lords, in the 4th volume, in the chapter upon *Premunire*, your lordships will find this passage —

Mr. Justice COLERIDGE. What page?

Mr. Hill. Page 108, my lord. “The very nomination to bishopricks, that ancient prerogative of the crown, was wrested from King Henry the First, and afterwards from his successor King John; and seemingly indeed conferred on the chapters belonging to each see; but by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually vested in the Pope.” To that passage the annotator, whose work I hold in my hand, has appended this note, part of which I will read, part only referring to the subject in hand. “With regard to the right of nomination, which the author calls ‘that ancient prerogative of the crown,’ however ancient a prerogative, and ancient it undoubtedly was, it was itself, nevertheless, an infringement of the original constitution of the church, according to which bishopricks were filled by the election of the clergy and laity of the respective dioceses. But the diocesan clergy had first excluded the laity, and then had been themselves excluded by the cathedral, and in some instances conventual, chapters; and when bishopricks became endowed with large temporal possessions and power, it seemed but a necessary consequence that the crown should have a control over the manner of filling them. Long usage had legalized, what reason had first introduced.” But, my lords, to that passage, which says

(b) The inference, here drawn by the learned counsel, does not accord with the historical fact; for it appears that, notwithstanding that the bishoprick of Sodor and Mann was donative, confirmation, nevertheless, took place, as stated by Mr. Badeley, in his argument, *post*. The Editor’s attention has been directed, by a learned divine, to an instance which occurred as late as the year 1755. In the “*Memoirs of Mark Hildesley, D.D., Lord Bishop of Sodor and Mann*, [the immediate successor of Bishop Wilson], *by the Rev. Weeden Butler, London, 1799*,” at pp. 137, *et seq.*, is given at length the form of confirmation of Bishop H.,

which is substantially the same as the form used in England. Bishop H. was nominated by the Duke of Athol, then Lord of Mann, without any capitular election. The nomination is formally set forth in two documents, pp. 131, 132; one of them being Dr. H.’s acceptance of the nomination; and the other, the mandate of the Archbishop of York, his metropolitan, for the installation. The proctor, who appears before the Vicar General, praying for the confirmation, is the “Proctor for the most noble James Duke of Athol, Patron of the bishoprick of the Isle of Mann and Sodor, and of Sodor of Mann.”

that the statute of Henry 8 had restored in effect the nomination of the crown, the learned annotator appends no note at all; and I believe that, great as has been the attention paid by learned men to *Blackstone's Commentaries*, no one of his annotators, as far as I know, has ever controverted that text of his. Thus, my lords, we have, first of all, the statutory comment which I have read; and, in the case of any one but *Blackstone*, I should hardly have ventured to quote the words of an individual, as additional authority to a statutory interpretation.

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My lords, to these express authorities what is it that has been opposed? I apprehend, my lords, when the matter is examined, I shall be borne out in saying, literally, nothing at all. My lords, with regard to that case which occurred in the year 1628, first of all, it appears in no Reports whatever. The first we hear of it, is in *Collier's History*, *Collier* living some sixty or seventy years after the event which he records(c). Next, all that which regards Dr. Rives's *admissions* (d), whatever it might be, would come to nothing, because it cannot be taken beyond the mere statement of Dr. *Burn*, who wrote rather late, your lordships know, in the last century, at all events more than a century after the event(e). And, my lords, supposing that it all took place, as imagined, I should be very much astonished, knowing what I do of your lordships' decisions, that you would come to the conclusion, that a debate in the House of Commons, one chamber only of parliament, could give a construction of an act of parliament, which would have any operation upon the minds of this court. My lords, I believe, the most zealous supporter of the privileges of parliament, in which zeal I myself will not yield to any man in existence, will never go the length of saying, that the House of Commons is a court for the purpose of sending a bookseller to oppose a bishop, and then, in debate, of putting a construction upon the statute under which the bishop was elected. I cannot imagine any person, out of a lunatic asylum, who would be wild enough to offer such an opinion.

Review of the authorities adduced on the other side.

Mountague's case.

Then, my lords, with regard to that case of *Evans v. Ascutie*, which was cited by my learned friend, Sir *Fitzroy Kelly* (f), and of which, no doubt, your lordships will hear more said, when the rule comes to be supported, I do pray your lordships to recollect what was the object of that part of the case which bears upon the matter in hand. The question there was simply this: whether a dean of York, who held his deanery in commendam with the bishoprick of Limerick, had lost it before he received a new dispensation to hold it in commendam with the bishoprick of Bristol. My lords, that was the whole question. Now, my lords, the test which the court took was this: the court said, if the dispensation comes, before the old preferment is avoided, it comes time enough. The question is, whether the deanery of York with the bishoprick of Limerick,—

Case of Evans v. Ascutie.

(c) Vide *supra*, p. 163.

(d) "Upon which it hath been observed, That Dr. Rives admitted that the opposition was good and valid, had it been legally offered; and that the parliament of that time

proceeded upon the same opinion." 1 Burn, E. L. 207.

(e) Burn's Ecclesiastical Law was first published in 1760.

(f) *Supra*, p. 107. See p. 146.

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whether these two preferments are avoided by election, where there has not yet been confirmation of the new bishop. For, your lordships will recollect, there must be a confirmation even upon translation. No new consecration is necessary, because the function and office of consecration is to make a clergyman one of the order of bishops: it is a species of ordination; and, when once consecrated, he is a bishop for life; and, although he should lose any particular bishoprick, he can exercise his function of ordination, not merely in his own diocese, but any where else. It is a personal qualification, which attends him all over Christendom; so that, as we know, if a Roman Catholic priest, who has been duly ordained by any bishop of the Roman Catholic church, conforms to the Church of England, he is, *ipso facto*, a clergyman, and requires no new ordination; because the Roman Catholic bishop, though not a bishop of any English diocese, according to the English law, is a bishop, and exercises the personal privileges of a bishop. Then, my lords, in cases of translation, the court says, that the interval is narrowed between what we call election, properly speaking, (that is to say, what is done under the *Congé d'élire*), and the confirmation; and all the inquiry was with reference to the point, whether by the election he became sufficiently a bishop to avoid the former bishoprick and the deanery; and the illustration which was put by the court was this, "et come Jones dit, ne serra semble al Æsop's dog, que perde le substance per reaching al umbre." They could not put the bishop into the position of Æsop's dog, but they would give him one substance, that is to say, one whole complete bishoprick, before they held that he had lost the other substance, that is to say, the other whole complete bishoprick. My lords, in the course of the judgment, there was a very learned history given of what is called there the making of bishops; but it was with this view, to ascertain when it was that the different rights and powers, which belonged to a bishop fully made, came to that bishop, in order to show that the whole rights of a whole bishoprick did not come upon him until consecration; and then the apologue of the dog came in, as a happy illustration. If there be anything which he has not until consecration, (which is here represented by confirmation,) we cannot say that he has lost his former bishoprick. And certainly it appears in the course of that history, as I shall submit, and as I shall prove, though I think my learned friend the Attorney General has given some facts which already completely prove it, that they were speaking of the old papistical mode of election, and not of that which existed in the reign of Charles I; yet it certainly does occur that they speak of confirmation, as if there were to be something real done under it. But, my lords, what does it mean? Why it means this: we are trying to investigate when it was that the bishop gained successively each of the incidents of his bishoprick; and we say that he could not have gained anything before confirmation, because at confirmation he might be refused. Now, are they speaking in the present tense, or are they speaking, of what took place, in time past? They say, he takes nothing by his election: there they contradict the act of parliament, which says distinctly, that, upon the election, strictly so called, that is to say, upon the election by the

dean and chapter, he shall be lord bishop elect; he becomes that, therefore. But, my lords, they cite *Lancelottus*. What do they cite him for, with reference to an English act of parliament? For the purpose of considering how the election is modified and qualified by an English act of parliament? Why, what did *Lancelottus* of Perugia know of an English act of parliament, or care for it, if he did know? or what object had he, in writing, to take cognizance of an English act of parliament? It is perfectly clear, that he was speaking of the canon law, as it obtained elsewhere. But I believe, if *Lancelottus* be looked carefully at, it will be seen that he is not speaking of the general state of things; because we know that, all over Christendom, from a comparatively early period, the election was generally made by a presentation, by the sovereign to the Pope, of three names, the Pope choosing one of them, the dean and chapter not being troubled upon the question. That was so, according to the constitution of the Gallican church; and I believe it will be found that, in an early Council of Lateran, which was held in the 8th century, after 700 and before 800, the same power was conferred upon Charlemagne (g). If I do not mistake, the circumstance is mentioned in this very case. So that what occurs in *Lancelottus* could not be the general state of proceedings, in Roman Catholic countries even, but only in those states in which the sovereign had not that power. In England he had not that power. In Spain he had; but the *Cabildo* (which is a chapter of a cathedral) went through the sort of form which is gone through in England. In Italy, it is very probable that the cathedral, would have more power. But certainly, as far as the French church goes, it was as I have stated it; and I believe also as far as regards the emperor,—indeed there can be no doubt about it, because he would be considered as the successor of Charlemagne, in whose favour the decree of the early Council of Lateran was specifically made (h).

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Lancelottus.

The power of sovereign princes, in the appointment of bishops, in the time of *Lancelottus*.

My lords, I have given two reasons why your lordships should construe this statement in *Palmer's Report* as a statement of the judges as to what had been theretofore. I will give another. *Whitlock*, J. says, the third step is, "al roy de certifier ceo; et donque la est act del assent del elect, ceo ne poit estre sans son assent, coment ascun foits le Pape le voil faire" (i). Now, my lords, here is a reference to the Pope, and a reference in the present tense; for the whole story is in the present tense. It says, you cannot

(g) The Council, here referred to, is supposed (for doubts exist respecting it) to have been held under Pope Adrian I., A.D. 774. The following extract will be found in *Mansi's Councils*, vol. 12, p. 884 (Florence, 1766): "Hujus igitur concilii mentio est apud Sigebertum vulgatum ad A.D.CCLXXIII. his verbis: *Postea rediens Carolus Papiam cepit, iterumque Romam rediit, synodum constituit cum Hadriano papa, aliisque centum quinquaginta tribus religiosiis episcopis et abbatibus, in qua Hadrianus papa cum universa synodo dedit ei jus eligendi pontificem, et or-*

dinandi apostolicam sedem, dignitatem quoque principatus. Insuper Archiepiscopos et Episcopos per singulas provincias ab eo investituram accipere definivit, ac ut nisi a Rege laudetur, et investiat, episcopus a nemine consecratur." It is also mentioned in the *Corp. Jur. Can.*; Decret. 1, distinct. 63, c. 22.

(h) See *Van Espen*, Jus. Eccles. Univ., pars 1, tit. 13, cc. 2, 3, 4; 1 Burn, E. L. 194 b (9th ed. by Dr. Robert Phillimore), and the authorities there referred to.

(i) *Palmer*, 472.

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direct autho-
rity for the
right now
claimed.

have an election without the assent of the bishop: you cannot force upon him a bishoprick, "as the Pope sometimes will do." Then again, my lords, in another place (*j*), he says, "Tanques confirmation l'elect poet estre refuse; et pur ceo reason la est avant le confirmation un citation de opposites a ceo jour,"—at this day. My lords, is not that the case of the court looking into the old form of election, when election was a substance, and not a shadow, to see what were the consequences of each step upon the bishop? And is it not perfectly consistent with either view,—(either that the confirmation is a form, or is a substance),—that, at his election, certain of his functions should come upon him, certain rights should accrue to him; at his confirmation, certain other rights; and, at his consecration, the remaining rights: which is all they say?

My lords, I should apprehend that what would alone avail my learned friend, would be, to find, and bring to your lordships, some Report upon the point, directly in the teeth of the power of the crown to have the uncontrolled appointment of the man whom the crown has chosen. I should have expected, that, in order to rely upon authority, my learned friend would have produced to your lordships some case, in which not only the power of opposers to come in and oppose was established by the fact, and supported afterwards by the court, but also where the opposition was successful; in which the confirmation had been withheld, and the consequences of withholding the confirmation had been incurred. Now, my lords, what is the state of things?—

Lord DENMAN. We will proceed to-morrow morning.

Mr. Hill. At the sitting of the court, my lord?

Lord DENMAN. Yes.

25th Jan 1848.

Mr. *Badeley*. Will your lordships permit me to state, that I have just received a note from my learned friend, Sir *Fitzroy Kelly*, saying that he is suddenly taken ill, and obliged to send for a physician. Whether it is an attack of influenza or not, he does not know; but he is so unwell, that he is not able to attend to-day. He fully intended to be here, because I was arranging with him the time at which he would probably be wanted. Dr. *Addams* is not here at present, in consequence of his supposing that Sir *Fitzroy Kelly* would not be called upon till the middle of the day, and thinking it probable he himself would not be wanted till a later period of the day. I thought it right to mention this to your lordships, in order that, in the absence of our two learned leaders, if it meet with your lordships' approbation, the matter might be allowed to stand over.

The *Attorney General*. My lords, I must—

Mr. *Badeley*. I ought to mention to your lordships, that Sir

F. Kelly, in his note, says, if he is able to move to-morrow, he will come, and endeavour to be here, the first moment he can.

Lord DENMAN. The consequence is, we must hear the other gentlemen who are retained on the part of the same parties.

Mr. Hill. My lords, I desire to call the attention of the court to the 5th section of the 25th of Hen. 8, c. 20, and to the latter portion of it. After enacting that the bishop elect is to make such oath and fealty only to the king's majesty, his heirs and successors, as shall be appointed for the same, it directs that "the king's highness, by his letters patent under his great seal, shall signify the said election to the archbishop; requiring and commanding such archbishop, to whom any such signification shall be made, to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things for the same, without any using, procuring, or obtaining any bulls, letters, or other things, from the see of Rome for the same, in any behalf." My lords, it has been said, of that passage, that it recognizes that the archbishop is to do all matters which are necessary for the confirmation; and that that would seem to infer, that these particular matters in question were matters of substance, and not of form (*k*). My lords, if your lordships will be kind enough to look at the words themselves, your lordships will find that they are all of them words referring to some benefit to be given to the bishop elect, and that they have not the slightest reference to any controversy of his title; nothing against him, but all for him. They are "benedictions:" that is clearly a word which has no reference to a controversy, to a denying of his title, to a questioning of it in any way, but the contrary. "Ceremonies:" that would not be a word which would express any matter of controversy. "And other things requisite for the same:" requisite for what? Requisite for giving him all the benefit of confirmation, but not requisite for inquiry whether he ought to be confirmed or not. "Without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome for the same, in any behalf:" your lordships will recollect that, for purposes, partly probably of lucre, and partly of power, the see of Rome had, in the course of years, so contrived, that as many as twelve bulls were requisite for the confirmation and consecration of a bishop; the pallium must also be sent; and there were other matters, which could only be procured from Rome, that were requisite for that purpose.

Now I wish to call the attention of the court to a later portion of the act, to that part which regards the penalty for not electing, confirming, or consecrating a bishop named. That is all contained, my lords, in the 7th section, which is in these words: "And be it further enacted by the authority aforesaid, that if the prior and convent of any monastery, or dean and chapter of any cathedral church, where the see of an archbishop or bishop is within any the king's dominions, after such licence as is afore rehearsed shall be delivered to them, proceed not to election, and signify the same

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Impossible to
limit inquiry
within the term
prescribed by
the act, for
confirmation,
&c.

according to the tenor of this act, within the space of twenty days, next after such licence shall come to their hands; or else, if any archbishop or bishop within any of the king's dominions, after any such election, nomination, or presentation shall be signified unto them by the king's letters patents, shall refuse, and do not confirm, invest, and consecrate, with all due circumstance as is aforesaid, every such person as shall be so elected, nominate, or presented, and to them signified as is above mentioned, within twenty days next after the king's letters patents of such signification or presentation shall come to their hands; or else, if any of them, or any other person or persons admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of due execution of this act; that then every prior and particular person of his convent, and every dean and particular person of the chapter, and every archbishop and bishop, and all other persons, so offending and doing contrary to this act, or any part thereof, and their aiders, counsellors, and abettors, shall run into the dangers, pains, and penalties to the Estatute of the Provision and *Præmunire*." Your lordships will not fail to observe, that the king's mandate, contained in his letters patent, is "to confirm, invest, and consecrate," considering it all as one matter, one necessary act; each succeeding step necessarily following upon the preceding: and all this they are to do within twenty days. Now, my lords, for one moment, upon the construction of this act of parliament, see whether it would be possible, upon the hypothesis that the election is a substance, or that the confirmation (which is part of the election) is a substance, that the archbishop could remain without the danger of a *præmunire*. My lords, the number of opposers is not limited. According to my learned friends on the other side, the subjects of that opposition are anything but limited; they may spread over the whole life of the bishop elect; they may attack his morals; they may attack his learning; they may attack his doctrines; they may attack his legitimacy; and yet all these subjects are to be disposed of within twenty days. It will require no stretch of the imagination to contemplate a case, in which there should be circumstances presented, that would require, not twenty days, nor twenty months, but twenty years, for their due investigation: yet all must be done within twenty days! But, my lords, the most material part of the act, as it appears to me, is that passage of it, which regards the *præmunire*, being incurred by any "*let*." Now the meaning of the word "*let*," I understand to be, a hindrance, a delay: a "*let*" is a delay or hindrance of any kind. That *letting* is necessarily not confined (or the act would have been probably, in those days, a dead letter) to lets and hindrances proceeding immediately from the court of Rome; but your lordships will have the kindness to attend to these words: "or else, if any of them, or any other person or persons, admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of the due execution of this act; that

then every prior and particular person of his convent, and every dean and particular person of the chapter, and every archbishop and bishop, and all other persons, so offending and doing contrary to this act, or any part thereof, and their aiders, counsellors, and abettors, shall run into the dangers, pains, and penalties of the Estatute of the Provision and *Præmunire*." My lords, these words are the most comprehensive, and at the same time the most stringent, that the English language can produce. The act forbids any "process" producing a *let* (which is a hindrance or delay). Why, my lords, is not the process, which, it is maintained by the other side, ought to have been entered into and proceeded with, itself within these words? Nay, I might go further, and say, is not the very citation itself within these words, when they come to be accurately considered? And see how consistent these words are with the earlier part of the act. The earlier part of the act enacts, that the election shall be good to all intents and effects:—that "their election shall stand good and effectual to all intents," are the precise words. Your lordships know, there is a general rule and principle of law, that where an election is to be confirmed, the election is never considered complete, until the confirmation; but where, upon the election being made, the law does not contemplate there will be any controversy, or anything further to be done, there a different rule applies. In the election of a member of parliament, it is not in contemplation of law, as a matter of rule, and of regular proceeding, that there will be any controversy of that election: and therefore, upon the return, upon the member taking the oath and his seat, all is done; unless there is a new process afterwards, which, if it takes place, brings the election into controversy. But not so in those cases, in which there is, as a matter of course, and as a regular and necessary part of the proceeding, a confirmation: there the election is not complete, till the confirmation is complete. Now, my lords, if the election (where the act has only spoken of that portion of it which is made, under the *Congé d'élire* and the letters missive, by the dean and chapter,) is to stand good and effectual to all intents, how can it, by any possibility, happen, that any thing which follows can be more than a matter of form? Then your lordships see that, applying the meaning of the last section to this strong language which I have just read, they both stand together and are in perfect consistency: if the election is "good and effectual to all intents," it naturally and properly follows, that those, who recur to any controversial proceedings, are not merely acting contrary to the election, (for the act does not stop there,) but are acting either "to the contrary, or let of due execution of the act," are doing wrong: they are punishable; and that punishment is a *præmunire*.

In any view, therefore, of the case, my lords, the confirmation is a form, a merely ministerial act; and the particular subsidiary forms with which it is accompanied, and by which it is accomplished, become matters of no moment at all. My lords, it has been stated by my learned friend, Sir *Fitzroy Kelly*, when he obtained this rule, that the object of the act was to cut off the connexion with the Roman

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Hen. 8 was
designed to
prevent the
indirect inter-
ference of Rome.

see (*l*). My lords, properly understood, I entirely agree with that view. But my learned friend, Sir *Fitzroy Kelly*, seemed to think, that that object would have been accomplished in the reign of Hen. 8, by making it illegal to obey the commands of the court of Rome, when they came direct from Rome, or to make any application directly to Rome; that is to say, he confined the operation of the act to destroying any immediate and open connexion between the election of bishops and the court of Rome. My lords, so to have confined it in those days, would have been to make it nugatory, and a dead letter. Your lordships know, as a matter of history, that this particular act is chosen by chronologists, and fixed upon, as the epoch of the Reformation. The reformation was at all events young, if it did not come into birth at that moment. My lords, at that time, all the existing bishops, except the archbishop of Canterbury (*m*), were papists; even the archbishop who succeeded Cardinal Wolsey only two years before, Archbishop Lee. Your lordships will find that the historian of the reformation, Bishop *Burnet*, in various parts of his great work, speaks of Archbishop Lee; and, upon more than one occasion, represents him to be a person, after his elevation to the see of York, who was feared by the king, as a person secretly addicted to the Court of Rome, and secretly a partizan of the see of Rome. My lords, it was necessary, therefore, in the then state of the minds of men in the church, to guard against that secret predilection operating against the policy of the crown, as shown by this act of parliament, and interfering with the election of bishops; and little indeed would have been done, even if the direct interference of the bishops and archbishops had been prevented by the act, if persons putting themselves into the position of the applicants for this rule, could have impeded its operation. An honest zeal, in favour of the ancient forms and doctrines of religion, would probably have actuated many minds, and would have suggested the steps which are taken, as it appears to me, with some similarity of feeling and predilection, on the present occasion; and therefore all the avenues to interference with the power and right of the crown to *make* a bishop, (for that is the language of our old law) in all its stages and in all its parts, were to be guarded by this act of parliament. I cannot but think, having read it with some attention, that it would be impossible, even in the present day, to use more apt terms for accomplishing the object; if, for political reasons, it was not deemed advisable to sweep away all forms and ceremonies at once, and, instead of the election by *Congé d'élire* and the form of confirmation, to go at once to the step taken in the 1st of Edw. 6, and to make the nomination of bishops, openly and avowedly, as it was really and substantially, the act of the crown.

My lords, I adverted yesterday (*n*) to the curious fact, that when Queen Elizabeth did not think it politic, or perhaps safe, to revive the act of Edward 6, with regard to England, she felt her power strong enough in Ireland to take that course. My lords, I observe that the very learned editor of the last edition of *Burn's Ecclesiastical Law*, my learned friend Dr. Phillimore, takes a similar view. He

In Elizabeth's
reign, the
anti-popish
feeling
stronger in
Ireland than
in England :

(*l*) *Supra*, p. 103.

(*m*) Cranmer.

(*n*) *Supra*, p. 197.

remarks upon it, as a very curious fact, but one thoroughly borne out by the history of the times, that the public sentiment in Ireland against the encroachment of the Pope was far stronger than had ever prevailed in England, and much more unanimous; and that there was much greater power in the crown in Ireland, in that respect, than in the reign of Elizabeth existed in England (o).

My lords, I am now to consider whether, supposing it was the duty of the vicar general to receive and act upon the opposition that was about to be made to the confirmation of the bishop of Hereford, a mandamus will lie to this court; whether a mandamus will lie by the present parties; and whether it will lie for the causes and reasons which the present applicants offer to the court.

My lords, will a mandamus lie at all? Here is a matter of clear ecclesiastical jurisdiction. Here is a matter which, on the part of those who seek to set the court in motion, is not connected with any temporal interest. Your lordships will perceive that it would be a fallacious test to try the right of the present applicants to come to this court, by asking whether the bishop would have no right to come to the court, because the bishoprick is a temporal as well as an ecclesiastical office. The bishoprick confers a peerage. The bishoprick has attached to it revenues and other temporal rights of vast importance. It is therefore quite clear, whether the function of the archbishop, at the confirmation, is a mere ministerial function, as we maintain it, or is a judicial function, as it has been stated on the other side to be, that to set the archbishop in motion, supposing he refuse to enter upon the confirmation at all, it would be quite competent for the bishop to come to this court, upon the same grounds as have supported applications to it for a mandamus against an ecclesiastical judge for refusing to grant probate of a will. But I think your lordships will agree with the doctrine of Lord Holt, in a case which, I believe, was adverted to by my learned friend, the Attorney General, of the *Bishop of St. David's v. Lucy*, in Lord *Raymond's Reports* (p). The rule stated by that learned and most eminent person is, that the court will not interfere with the ecclesiastical courts, when they are dealing with spiritual matters, upon grounds which are confined to those spiritual matters. That is the doctrine which he lays down. My lords, my learned friend has dealt with that, and therefore—

Mr. Justice PATTESON. There, I think, the parties being before the Court, the bishop complained that his allegations were not received; and he applied for a mandamus to compel the court to receive them?

Mr. Hill. Yes, my lord.

Mr. Justice PATTESON. In this case, the objection goes further back. They did not allow the parties to appear before the court.

Mr. Hill. I am aware it does; but, if your lordship recollects, Lord Holt does not decide the case upon that distinction. He decides it upon the principle, not that the court was exercising a

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hence, a different system adopted.

Mandamus.

The present a matter of purely ecclesiastical cognizance.

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(o) 1 Burn. E. L. 415 mm. (9th ed. by Dr. Robert Phillimore).

(p) 1 Ld. Raym. 544; *supra*, p. 150.

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argument.

The opposers
have no suffi-
cient interest;

or an interest
of too vague
and general a
character.

Mandamus
touching the
election of the
mayor of a
borough, at the
instance of an
inhabitant.

jurisdiction with which it was vested, but that it was a matter of ecclesiastical and spiritual jurisdiction purely.

My lords, the question remains behind, whether these parties can apply to your lordships for a mandamus, even conceding, for the sake of argument, that a mandamus would lie at all. Now, my lords, upon what ground do they appear? Have they any temporal interest, or any interest of any kind (using the term with the limitation with which it must be used for the purpose), which entitles them to come to this court? My lords, it is said, that if the bishop is elected, he becomes a spiritual judge, and that the applicants are incumbents (some or one of them) in the diocese of Hereford, and, by that means, obtain an interest in his election. Not, my lords, I answer, such an interest as the law contemplates, to give a title to come into this court, and ask for a mandamus; and for this reason:—the interest which these two gentlemen have is an interest which other persons, to a very large number, have. If it is founded upon the circumstance of the bishop being a spiritual judge, his functions are not confined, and his jurisdiction is not confined to the clergy. It is as a spiritual judge that he interferes with wills; and it is as a spiritual judge that any application is made to him by a layman for probate of a will. As a bishop, he has the licensing of all schoolmasters within his diocese: all schoolmasters, therefore, teachers of grammar schools, are, by the Act of Uniformity, under his jurisdiction, with regard to the exercise of their profession (*q*); and they would have the same right as these gentlemen. There would be the clergy and schoolmasters, with special interests; and there would be all the world with interests, as regards wills. Your lordships will consider that there is one very large and important branch of the diocese of Hereford, and every other part of the country, and that is the female inhabitants. The bishop's court is the peculiar guardian of their honour, when it is attacked by unwritten words (*r*). They, therefore, have an interest in the appointment of a bishop as a spiritual judge. My lords, who has not? Is any body, therefore, to come here and ask for a mandamus? That, my lords, is contrary to all the rules and regulations by which your lordships have been governed. Take this case: the mayor of a borough is a justice of the peace: even under the Municipal Corporation Act (*s*), he remains a justice of the peace. The mayor is elected by certain persons, in a certain manner. Would your lordships allow any inhabitant, not a burgess of the particular borough over which he is mayor, to come before the court, and interfere in his election by a mandamus?

Mr. Justice COLERIDGE. I think, we have determined that, in a case from the Oxford circuit.

Mr. Hill. What was that case, may I ask?

Mr. Justice COLERIDGE. Merely as an inhabitant, I think. Under the old law, the inhabitant was admitted, upon the express ground, because he was within the jurisdiction.

(*q*) 13 & 14 Car. 2, c. 4, s. 11. And
see 23 Eliz. c. 1, s. 6.

(*r*) 2 Gibs. Cod. 1025.
(*s*) 5 & 6 Wm. 4, c. 76.

Lord DENMAN. I think there was a case of *quo warranto*, at this very city of Hereford; in which this objection was taken, and held not to apply. I believe, the *quo warranto* was refused on some other ground.

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Mr. Justice COLERIDGE. On the ground of the conduct of the party, I think.

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argument.

Mr. Hill. I think, your lordships would find, on some very different interest from that which says that a man has a right to a good judge.

Mr. Justice COLERIDGE. Is this a point which it is necessary to argue? There is no doubt that a bishop is a judge of temporal interests, as well as a spiritual judge of their doctrines.

Mr. Hill. In the first place, that ground would be *quia timet*. But, in the next place, I apprehend, the question is, whether the interest is not so wide, and referrible to such an immense number of persons, that the application might come from everybody. Your lordships know, that if a yard of my land is to be taken from me, for the purposes of a railway, or any other public object, I have a right to oppose the bill. But if an equal amount of property is to be taken from me, in the shape of a tax, I have no right to oppose the bill. It is not the amount of pecuniary interest, but the circumstance of its belonging to a small and well defined body of persons, that determines the question. Our most important and our dearest interests are necessarily, by the parliament, disposed of, without the intervention of private individuals, or private advocacy. I am much more interested, perhaps, in the state of the criminal law (every man is), than whether I shall lose a very small portion of my property by a private bill. Who is there amongst us, who would not feel infinitely greater reluctance to see any important change in the law of treason, for instance,—

Lord DENMAN. I beg your pardon. I find this, in the case of the *King v. Parry*, in 6 *Adolphus and Ellis*, 810. "On motion for a *quo warranto* information against a town councillor, founded on a defect in the burgess roll, it is not a valid objection to the relator, that he is not a burgess: his interest is sufficient if he be subject to the government of the councillors as an inhabitant."

Reg v. Parry.

The *Attorney General*. A *quo warranto*.

Lord DENMAN. Yet, as to the interest of the party, it is the same.

Mr. Hill. The rules regarding *quo warrantos* are somewhat different from those with regard to a *mandamus*. I was confining myself to the question of *mandamus*.

Mr. Justice COLERIDGE. But, upon that, the construction would be, if the office was full, a *quo warranto* would lie; and, if not full, a *mandamus*. The same rule will apply to both cases.

The *Attorney General*. I apprehend, not upon a stranger moving for a *mandamus* for an office.

Mr. Justice COLERIDGE. Not a stranger. It is begging the whole question, if you say, he has no interest at all. The question is, the amount of interest.

Mr. Hill. Your lordships have thrown out the question, whether the power of a spiritual judge would interfere with incumbency.

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argument.

Observations
upon the ob-
jections in-
tended to be
offered, as
stated in the
affidavit.

Unsoundness
of doctrine not

My lords, that power, if it be exercised at all, must be exercised over a very great number of persons. And I am at a loss to see, how it differs from the power, as to property which is disposed of by will. The two questions, with great submission to your lordships, seem to me to rest upon the same principle.

But, my lords, let me now call your lordships' attention to what it is that the applicants seek to urge to the archbishop, if they shall be admitted to urge anything. My lords, by the affidavit I find the grounds of opposition set forth: "And both these deponents further say, that the opposition, so intended to be made to the then present confirmation of the election of the said Dr. Renn Dickson Hampden to the bishoprick of Hereford, was founded upon two books written, printed, and published by him; the avowed purport or object of the first of the said two books being to illustrate the injurious effects of dogmatism in theology; and in both books, in illustration of the (supposed) effect of dogmatism in theology, it is well known, or justly suspected, that, whether so by him intended or not, he hath, in fact, spoken or declared in the manifest derogation or depraving of many things in the Book of Common Prayer, and hath maintained or affirmed divers doctrines repugnant, or at least contrary to the Thirty-nine Articles of the Church of England, especially those, or most, or many of them, particularly concerning faith and doctrine. And these deponents further say, that expressly by reason of or with reference to such two books aforesaid, he the said Dr. Renn Dickson Hampden, (then recently appointed Regius Professor of Divinity in the University of Oxford,) in the year of our Lord, 1836, incurred the solemn censure of that university, and which censure (the said Doctor R. D. Hampden neither then nor since having, in any manner, explained or renounced or retracted those parts of his teaching which have led to his being so justly suspected as aforesaid) was in effect re-affirmed by the said university, in the year of our Lord, 1842. And these deponents further say, that articles, alleging and setting up unsoundness of doctrine and teaching by the said Dr. R. D. Hampden, had been prepared and signed by certain learned civilians, ready to be given in as aforesaid, had the said parties been permitted to appear, and which these deponents are advised and believed to present and contain sufficient ground of opposition to the confirmation of the said Dr. R. D. Hampden" (t). Your lordships will perceive, from first to last, so far as the looseness and uncertainty of the allegations in the affidavit will permit your lordships to see what the matter complained of is,—an uncertainty, upon which I shall have to make one or two observations to the court,—your lordships see, the general scope of this matter is, that it was intended to found the opposition to the confirmation of Dr. Hampden upon some points of doctrine. My lords, it is certainly worthy of remark, that in none of the books which have been brought before your lordships, on the subject of confirmation, (because they have reference to what took place in Romish times,) has unsoundness of doctrine been mentioned among the circumstances or facts which would furnish a ground of objection. My lords, this

is not very difficult to account for. Unsoundness of doctrine, and depravation or derogation of the rituals of the Romish faith,—any denial, or any expression of a doubt of the soundness of the doctrines or articles of that faith,—would have been heresy; would have been a capital offence; would have been a matter not to be inquired of incidentally, at an examination of this kind: and I should no more expect, in Romish times, to find such an examination going forward, than I should, now, to find an examination instituted, whether any gentleman elected a bishop had committed murder.

And, my lords, this leads me to one point of objection to this mandamus, which, it appears to me, your lordships will consider of great importance. Your lordships will find, from the formal proceeding, that the bishop is not a party to this inquiry. Is there, my lords, an instance to be found, in the many applications, for the last two centuries, that have been made in this court for a writ of mandamus, in which a mandamus was granted to inquire into criminalizing matter, where the party, supposed to be guilty of the offence, was not a party to the inquiry? My lords, it seems to me to be contrary to the first principle of justice, that it should be so.

Mr. Justice COLERIDGE. Is not a coroner's inquest an instance? I apprehend it may end in a crimination, charging a man with murder; and yet, he is no party.

Mr. Hill. That is an inquiry.

Mr. Justice COLERIDGE. I thought you said, no case of inquiry.

Mr. Hill. No case of inquiry, leading to a judgment.

Mr. Justice COLERIDGE. This would lead to no judgment.

Mr. Hill. Supposing it would lead to a judgment that the confirmation should be refused; that is a judgment. Your lordship sees, supposing this to be a judicial matter, it must lead to a judgment on the one side or the other; which may be subject to appeal, it is true; but it is a final and complete judgment: it is, that the bishop be confirmed, or that he be not confirmed; that the election is good, or that it is not good. That is not to put the matter into a train of inquiry. It may be there is an appeal—I do not know that there is—it may be that there is an appeal; but the circumstance of there being an appeal, by writ of error, or in any other manner, does not affect the finality of the judgment, in the eye of the law. There is an appeal after a conviction for a misdemeanor, by a writ of error; but the judgment is a final judgment; as here it would be a final judgment. It would not be like an inquest of office, which is for the purpose of putting a matter into a train of inquiry. A coroner's inquest is, in effect, no more a judgment, than a bill of indictment, found by the grand jury, is a judgment that the prisoner is guilty. The inquest of a coroner can be treated as a bill of indictment, and submitted to a common jury. I think, therefore, your lordships will find, upon consideration, that there is no analogy in our law, and I should be very much surprised if there were, for a proceeding of this kind: because it does not depend upon positive law, but upon natural justice; it is not to be found in the law of any civilized country, that there should be the means of making an examination, which is to affect most seriously the interests of a person, to which that person himself is not a party.

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a recognised ground of opposition at any time.

The bishop elect no party to the inquiry.

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The matter charged, not an offence, unless the party aspires to the episcopate.

A conviction elsewhere, requisite before this court will interpose.

The granting of the mandamus can have no practical result.

Uncertainty of the matter charged.

And, my lords, to do justice to the proceedings before the Reformation, I find no hint, no footstep, of such an examination as this; no trace of any inquiry which is for the purpose of criminating the newly elected bishop. And it is not that he commits an offence, by what is supposed to be done here, unless he afterwards aspires to be a bishop; for it is no offence so long as he does not aspire to be a bishop. Such, surely, is not the state of things. If, by loose charges, it is meant to say, that Dr. Hampden has violated the act of Edward 6 (*u*), by derogation or depraving of the Book of Common Prayer, why, my lords, the act applies to all men: it applies to clergymen emphatically, because the punishment on them is greater than upon laymen; but, in the 2nd section, it applies to laymen also. Again, my lords, in advocating and writing that which is contrary to the Thirty-nine Articles, there is an ecclesiastical offence; not merely in a bishop, or in any one who is a candidate for a bishoprick, or elected to a bishoprick; but in all ecclesiastical persons whatever.

My lords, even if the person complained of is made a party to the inquiry, your lordships are very careful never to interfere in a summary manner, where it is incidental to some other jurisdiction, where there is a precise and clear and obvious and straightforward mode of making the inquiry, and a form prescribed by law. How often have your lordships said, in this court, where there has been an application against an attorney, as an officer of the court, if it was in respect of matter which might be made the subject of prosecution, "Prosecute: obtain a conviction; and then come here, and we will deal with that conviction." But, my lords, that is a very much weaker case than this; because, in that case, your lordships make the party to the charge a party to the inquiry: here, there is no such thing.

Again, my lords, your lordships always act upon this rule, that a party coming for a mandamus, applying as he does to the discretion of the court, and not suing out a writ of right, must show that, if the mandamus go, there is a fair probability that some effectual step can be taken. If it is a matter of title, he must set forth his title. If it be a title that he wishes to establish and to protect by the mandamus, he must set it forth, so that your lordships may see that it is not a nugatory application that is about to be made. Or, my lords, even supposing that the court can take cognizance, that is, supposing that it be a court which can take cognizance of errors of doctrine, what do your lordships find in this affidavit, to show that there is a matter to be presented to the archbishop upon the subject, which any one even of the applicants has pledged himself is matter of crimination against the bishop elect? Will your lordships again look at the mode in which this affidavit is drawn. It is said, that the opposition intended to be made to the confirmation and election "was founded upon two books written, printed, and published by him: the avowed purport or object of the first of the said two books being to illustrate the injurious effects of dogmatism in theology; and in both books, in

(*u*) 2 & 3 Edw. 6, c. 1. "For uniformity of service and administration of the sacraments throughout the realm."

illustration of the (supposed) effects of dogmatism in theology, it is well known, or justly suspected"—And that "*justly suspected*" overrides the whole. In the first part of the passage, it is said, that he published two books, the object or purport of one of which was to illustrate the effects of dogmatism in theology: that is the object of the first: the object of the second is not mentioned. My lords, is there any harm in publishing a book to show the injurious effect of dogmatism in theology? I suppose it will be admitted that Dr. Johnson was as good and as high a churchman as ever existed; but Dr. Johnson did not seem to think there was any harm in attacking dogmatism, which he defines thus: "Dogmatist. A magisterial teacher; a positive asserter; a bold advancer of principles." Then he gives an instance, selected by himself from a most eminent writer, Dr. Watts, showing the evils of dogmatism: "A dogmatist in religion is not a great way off from a bigot, and is in high danger of growing up to be a bloody persecutor." This gentleman has written a book, to show the injurious effects of dogmatism in theology. Every other part of the aspersion, (for I can call it by no other name: it is not an allegation; it is not a charge; it has nothing manly or definite about it,) every other portion of it is overridden by these words, "*or justly suspected*." Will your lordships issue a mandamus for the purpose of raising a painful discussion on such matters here? Those who ask for a mandamus themselves will not pledge their belief that the matter of objection really exists: but they only say it is *justly suspected*. And then, my lords, they speak of those works as having for their object to show the disadvantages and evils of dogmatism in theology. My lords, the works, which are not before the court, may have other objects. It, perhaps, would not be unjust to describe the *Decline and Fall* as a book, the object of which was to undermine the Christian religion; but we all know, that it had many other and far better objects. So, these books, treating partly upon dogmatism in theology, might very naturally lead the learned writer to consider the effects of dogmatism in other matters; in politics, for instance; and when you find that there has been a censure by this learned university, and that even the subject upon which that censure is supposed to have passed is not stated, I am naturally led, by reading history, to contemplate the possibility of the censure being upon some matter unconnected with religion, but very nearly connected with politics. Supposing that Dr. Hampden had found that the dogma was dogmatically insisted upon, of

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theology.

Dr. Johnson.

University
censure upon
Dr. Hampden.
The present
opposition
influenced by
political con-
siderations.

"The right divine of kings to govern wrong,"

it would not be the first time that such a doctrine was found fashionable, in the University of Oxford, though coupled with

"Th' enormous faith of many made for one."

He might have had it for an object to show, that such matter was not altogether that which ought to be treated of after the manner of dogmatists. But what is this censure? Nothing can turn upon it: it is not before you; nor do the gentlemen, who made the application for this rule, affect to say, that they are the agents

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of the university, for the purpose of calling on the archbishop to act upon this censure. They are strangers to it themselves. It is not matter which can properly be brought before your lordships; and, I apprehend, it furnishes no possible assistance to their case. Now, my lords, that is the only charge; and that charge is qualified, as regards the contrariety to the Book of Common Prayer, by this statement, "that, whether so by him, [Dr. Hampden] intended or not, he hath, in fact, spoken or declared in the manifest derogation or depraving of many things in the Book of Common Prayer," in those books. If it is meant to be said, that what has fallen from Dr. Hampden is unintentional, why then surely, that cannot be made matter of charge. But my complaint is, that all the allegations are so loose, both in conception and expression, that it is impossible for your lordships to see that the persons making them are pledged to any thing. They go on to state, that these charges were reduced into articles by learned civilians, who have signed them; but they do not bring those articles before the court. They leave the court to pick its way through the difficulty of this shadowy, dreamy statement, which I have read.

I apprehend, therefore, that if the matter stood here, your lordships would see that the accusing parties had not brought themselves within any of the rules which have been established. Mandamus is not a writ of right: it has been held, and is now settled, to be a writ of discretion; and that doctrine was distinctly laid down, in the case of *The King v. The Commissioners of Excise* (2 Term Reports, 385), by Mr. Justice *Ashhurst*; and it has been adopted and acted upon by the Court of Queen's Bench, in several cases, when presided over by Lord *Ellenborough* and by Lord *Tenterden*. In the case of *The King v. The Paddington vestry (w)*, your lordships will find that, upon an act of parliament being brought under the consideration of the court, upon which it was urged that a mandamus would lie to the vestry to take steps towards repairing the roads, the court was of opinion that public interest, and the public justice of the case, would not be promoted by issuing the mandamus: and these words fell from Lord *Tenterden*: "That the court has the power of considering whether justice be best advanced by directing a mandamus to issue, or by forbearing to do so, has been settled by many cases. It was laid down by Mr Justice *Ashhurst* in *The King v. The Commissioners of Excise*, that such an application is an application to the discretion of the court. The same rule was acted upon in *The King v. The Justices of Lancashire (x)*, and in *The King v. The Justices of Buckinghamshire (y)*. We are of opinion that, under the particular circumstances of this case, justice will be best administered by forbearing at present to issue this writ." In the former part of the judgment, he intimated that, at a future time, it might, at the discretion of the court, be proper to issue the writ. That case is in 9 *Barnewall and Cresswell*; and the judgment of Lord *Tenterden* begins at page 460.

Mr. Justice COLERIDGE. That is the case of the Paddington vestry?

(w) 9 B. & C. 456.

(x) 12 East, 336.

(y) 1 B. & C. 489.

Mr. Hill. Yes, my lord. My lords, there are many other cases upon this point: there is one in 1 *Term Reports*, p. 397 (z); and another at p. 423 (a). Then your lordships will find others in 15 *Viner's Abridgment*, under the head "Mandamus" (Z), p. 216; and also at (H 3), p. 204. There, a curious case is given, which is copied from *Jones*,—translated and copied verbatim; and that was, upon a custom, in a cathedral, to elect, when the prebends were all full, a person who was to succeed upon the next avoidance, and who was there elected, before the avoidance took place, to be ready to take possession of the next vacant prebend, the moment the vacancy did occur. Upon such an election having been made, and upon the avoidance occurring, the person so elected was refused admittance. He applied for a mandamus; and the court refused, stating that they thought the custom a ridiculous custom. Yet, by being a ridiculous custom, it would not be void; but, in the discretion of the court, they thought it was not a custom which called upon them to give this particular kind of remedy, to which the party had no claim as of right, being a prerogative writ, to be issued or not at the discretion of the court, having regard to all the circumstances of the case (b). Now, my lords, having regard to all the circumstances of this case, are your lordships of opinion that any good interest would be advanced by granting this writ? Is it not almost conceded that, whatever may take place under the writ, the confirmation here cannot be got rid of; or, if it could, that the election cannot be got rid of? But even supposing the confirmation could be avoided, what would be the consequence? Is the bishoprick to remain vacant during the life of Dr. Hampden? Is it possible to get over these words in the act of parliament, that the election, by the *Congé d'élire*, shall be of Dr. Hampden and shall not be of any other person, and that such election, when so made, shall be good and effectual to all intents and purposes? Why, my lords, if these words, the strongest that our language presents, cannot be got rid of, what would be the utility of attempting to disturb this confirmation? My lords, I am putting the case too low: what would not be the mischief, if you could by possibility put the crown, and the bishop elect, and the bishoprick itself, into a position in which there could be no valid appointment during the life of Dr. Hampden? My lords, I do think your lordships will be of opinion, that, so far from advancing the justice of the case, so far from doing any thing which would be serviceable to the community, a great and notable injury would be inflicted upon it, by taking such a step as your lordships are now asked to take. My lords, it is a first principle, in the granting of a mandamus, that your lordships should see that, whenever such a step is taken, something effectual, useful, and valid according to law, and according to justice, shall be accomplished. Is it pretended that, if this confirmation could be avoided, it would become the duty of the crown to issue a *Congé d'élire*, with fresh letters missive, containing the name of some other person? Can your

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Owen v. Stainbow.

An abuse of the court's discretion to grant a mandamus in the present case.

The inconvenience it would lead to.

(z) The King v. The Bishop of Aldermen of London.
Chester.

(b) Owen v. Stainbow, Jon. (Sir T.) 199.

(a) The King v. The Mayor and

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The mischief
it would cause,
by fomenting
a spirit of con-
troversy.

lordships for a moment imagine a more direct interference with the prerogative of the crown, and the provisions of the act of parliament, than such a consequence as that? If not, then, as all must be nugatory, or worse than nugatory, your lordships would not take a first step of a proceeding, in which the last must be of that description.

But there are other grounds, my lords, on which the cases show that the court is justified, before it grants a mandamus,—at all events, where there is no peculiar and well-defined interest on the part of those seeking it,—in considering the public convenience upon the matter. Now, do your lordships, does any man who justly values the establishment of the Church of England, desire to see controversies upon minute points of doctrine urged, upon the election of a bishop; when your lordships know it has been so truly said, that even the simplest proposition in *Euclid's Elements*, demonstrable as it apparently is to the perfect satisfaction of all men, would become a matter of controversy, if the determination of the question, on the one side or the other, were mingled up with the passions and interests of mankind? Will your lordships have these questions of doctrine, which, when they are discussed at all, ought to be discussed in soberness, and only by men of learning and of disciplined minds, brought into controversy in Bow Church, before the multitude? Is it not dangerous to infect the multitude in this country, or in any other, with the itch of controversy? Have we not known, in history, the monstrous effects of a disposition in the populace to discuss all points of doctrine and of church government? Your lordships will remember, there was a time when that disposition did not end (as it never does, when controversy becomes popular) with abstract matters, but extended, as it naturally and inevitably would, to the question of the existence of the very institution now under consideration, and ended in the temporary destruction of that institution. That was a time when we have only to read the description of our great satirist, to see that all mankind were imbued with these doubts, and difficulties, and niceties, which at present occupy the minds of a few, and fortunately of only a few. I speak of the time when

“The oyster-women locked their fish up,
“And trudged away to cry, No bishop.”

I do not know that similar causes may not produce, at all times, similar effects. Nor will your lordships forget that, even if these matters were confined to the clergy, ill consequences would be produced by bringing them into contact with the passions and the interests of mankind. Let not doctrines be discussed upon the question, whether a particular individual shall be elevated to a peerage, an ecclesiastical principedom. Depend upon it, they never, under such circumstances, will be discussed with temper, and discretion, and simplicity of mind, without which such a discussion can never be useful. And I hope and trust, that the minds of the clergy of England will not be called away from that great and noble object to which they have so admirably addressed their labours at the present time, the education of the people. They have seen, as your

lordships have seen, that crimes, by many supposed still to increase, are by all admitted not to have been effectually checked by any extension of our police, by any amelioration of our criminal law, by any improvement in the discipline of our prisons. My lords, we must look to the labours of our clergy: we must look with hope, as I do, not only to their public services, but to their private ministrations. I speak with some zeal, and with some confidence, upon this point, because I happen to have under my own personal observation evidence of the labours of the clergy in this good cause. Let not their minds be distracted: look to the value of their teaching; of their superintendence of schools; of their founding of schools; of their pastoral visits; of their friendly and sincere exhortation. These, I think, are matters that they, who have most studied the effects of criminal judicature, will be the first to agree, are more potent to the effectual diminution of crime, than any thing which can be done by the arm of the law.

My lords, I am not insensible to the evils of establishing forms in the place of substances: I was struck with the powerful and eloquent denunciation of my learned friend, the Solicitor General, of what he justly calls "shams." Let them be extirpated as fast as possible: let all fictions in law, all fictions in politics, if it be possible (though, perhaps, that is their great stronghold and last refuge), let all fictions in trade; but, most of all, let fictions in every thing connected with our religion, be banished, but not in this way; not by breathing new life into these dry forms, and giving them a dangerous and portentous power; but by abolishing the forms themselves,—which appear to stand upon no foundation of law, and to require nothing but the will of those ministerial officers, who published them to the world, to take them for ever from us. But, my lords, if they must still subsist, better are they either in their present state, than that they should have substance given to them: better an unseemly fiction, than a pernicious reality.

Dr. *Bayford*. My lords, under that permission which your lordships have granted to me (c), it now devolves upon me to address you, in reference to this most important case; a case, my lords, which involves not only a question nearly touching the prerogative of the crown, but a question which is intimately connected with the peace, quiet, and therefore stability of the established church in this realm.

Now, my lords, in order to commence the observations which I shall have to make to you, I will, in the first instance, call to your attention a passage, part of which has already been cited, but the whole of which sums the question up, in such a short and plain manner, and so much in accordance with everything else which has been found upon the point, that it appears to me (as indeed almost all other passages in this book do,) to exhaust the subject upon which it is written. My lords, I am about to call your attention to a passage in Sir *William Blackstone's Commentaries*. In his chapter upon the clergy (d), he speaks of the bishop and archbishop being

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&c. to be got
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gether, or to
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appointments.

Blackstone.

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elected by the chapter of the cathedral church, "by virtue of a licence from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair, throughout all Christendom; and this was promiscuously performed by the laity as well as the clergy: till at length, it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands; by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture, the elected bishop could neither be consecrated, nor receive any secular profits." So, therefore, your lordships see that the sovereigns, according to this statement, reserved to themselves the right of confirming the election, and of granting investiture of the temporalities. That was the early condition of the matter, prior to the intervention of the papal authority. He goes on to state, that "this right was acknowledged in the Emperor Charlemagne, A.D. 773, by Pope Hadrian I, and the council of Lateran (*e*), and universally exercised by other Christian princes: but the policy of the court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishopricks is said to have been in the crown of England (as well as other kingdoms in Europe) even in the Saxon times, because the rights of confirmation and investiture were in effect (though not in form) a right of complete donation." He next proceeds afterwards to state the alteration which took place, in consequence of the introduction of the papal authority into this kingdom; and then comes a passage, which has already been brought to your lordships' attention (*f*): "But by statute 25 Henry 8, c. 20, the ancient right of nomination was, in effect, restored to the crown: it being enacted that, at every future avoidance of a bishoprick, the king may send the dean and chapter his usual licence to proceed to election; which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect." And then he proceeds to detail the mode of election, as given by that statute. Now, your lordships' attention has also been drawn to the same general history of this matter, as it is given by Dr. *Ayliffe*, in his *Purergon* (*g*). Therefore we have the concurrent testimony, both of ecclesiastical lawyers, and of those whose practice is in the other branch of the profession; all concur in the same view of the matter, that this was originally the prerogative of the crown of these realms, and that, although an alteration was introduced by the usurpation of the Pope, that usurpation was subsequently put an end to, and the prerogative was thereupon restored to its ancient limits, except so far as any act of parliament intervened, except so far as there is any

Concurrent
testimony of
text writers
concerning the
crown's pre-
rogative;

(*e*) Vide *supra*, p. 203 n. (*g*). (*f*) *Supra*, p. 199. (*g*) *Supra*, p. 124.

direct act of parliament controlling, and putting on another basis, the power of the crown. We have them all saying, that when there was no longer any hindrance, when that which curtailed the power of the crown was taken out of the way, the prerogative was restored to the same position it held, prior to the introduction of the papal supremacy. The same is acknowledged and declared by acts of parliament, which have also been brought to your lordships' attention (*h*). The declaration of the legislature has been brought under your notice, as stated in the 1st of Edward 6. The declaration in that act respecting the *Congé d'élire*, and the mode of appointing bishops under it, is precisely in conformity with the statement of Sir *William Blackstone*, viz., that the original powers of the crown were restored to it under this statute of the 25th of Henry 8. My lords, the same has also been brought to your attention by another statute, the Irish statute, which speaks precisely in the same way. We have therefore the concurrent and universal testimony of all the writers upon the matter; and we have that testimony confirmed by no less than two declarations of the legislature, one in respect of this kingdom, and the other in respect of Ireland; and in them we have the matter stated in the same manner in which it is laid down by those writers. My lords, the subject has also come under the attention of your lordships' predecessors. The case of *O'Brian* and *Kivan* has been brought before you (*i*); and there your lordships saw, that, considering the matter solemnly, your lordships' predecessors took precisely the same view of it: and therefore this point stands confirmed in every way. I do not further revert to those authorities, because they have been brought before you, several of them more than once. They have all been alluded to more than once, at any rate; and therefore it is sufficient for my argument to show, that the matter stands unimpeached and unimpeachable, and must be taken as law; and it is in that light, I submit, that we must look at the question now before the court.

Now what is this statute of Henry 8? Are there any words altering the prerogative and power of the crown? Are there any words in it which tend to modify and restrain the prerogative of the crown? I apprehend there is not a single sentence of the kind in the statute. The 3rd section tells us the object with which the statute was introduced. "Forasmuch as in the said act," (that is, the act referred to in the 1st section) "it is not plainly and certainly expressed, in what manner and fashion—" This act, then, concerns the manner and fashion of something; it does not concern the principle of that thing; it leaves the principle untouched; it goes to the manner, the form, and the fashion of it: and inasmuch as that was not provided for, in such an important matter as this is, this act goes on to detail how the form and manner of the thing shall stand for the future. "Forasmuch as in the said act it is not plainly and certainly expressed, in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated within this realm, and in all other the king's dominions, be it now therefore enacted."—That I take to be the object of the act, expressed in the

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confirmed by statutory declarations;

and by judicial decisions.

Crown's prerogative uninterfered with by 25 Hen. 8, c. 20.

The object of that statute.

(*h*) *Supra*, pp. 138, 196.

(*i*) *Supra*, p. 131.

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act itself. It is no limitation of the power of the crown at all; but it is declaring the manner and the fashion in which this prerogative of the crown shall be put forth and exerted for the future. The prerogative itself therefore remains untouched, as it originally existed, with the intervention only of the papal parenthesis, (so to speak,) in our history; the power of the crown, before the commencement of that papal parenthesis, being equivalent to a donative power, as stated by the authorities and the writers to which I have ventured to call your lordships' attention.

My lords, your attention has also been called (*j*) to this, that, in regard to the deaneries of this country, a distinction exists; part of those deaneries being donative, and part of them resting upon the old law,—the general law; and that the same form of election, and so forth, is used in respect to the latter, which is used in respect to episcopal election. I will call your lordships' attention to the form now in use, the old form, save that, I believe, in the present day, it is used in English, instead of in Latin; but otherwise the same form is still in use, and always has been in use; and it is given us by a writer of great authority in these matters, I mean *Oughton*, in his *Ordo Judiciorum*. In the second volume of his work, he gives us the form of confirming the Dean of the Cathedral of Saint Paul's; and he gives us, as the first instrument, the mandate (so to speak) of the bishop: that is the first instrument which comes down, and sets the election, or rather the confirmation, in motion. Now the letters patent, which, in the present case of the bishop, set the confirmation in motion, are not anything like so full, as the instrument which sets the confirmation of a dean in motion. This mandate, this commission, which comes down from the Bishop of London, has words in it, which are excluded from the royal mandate which sets the confirmation in motion, in the case of the bishop. My lords, this commission from the Bishop of London, which *Oughton* gives us, and which is the first instrument in the case, is to be found in No. 127 of his book (*k*). It is in this form:—"Edmundus permissione divinâ, London Episcopus, dilecto nobis in Christo Humphredo Henchman, Legum Doctori, Vicario nostro in spiritualibus generali et Officiali principali, legitimè constituto, necnon Gulielmo Strahan, Legum etiam Doctori, salutem in Domino. Ad cognoscendum et procedendum in negotio electionis factæ"—So that it is to proceed to the business of election, which has already been made; and then it describes the person, and so on, and continues:—"nominati et electi, necnon quoscunque contradictores et oppositores (qui, in termino aliâs ad id per nos præfixo et assignato, coram vobis legitimè compareant) in solitâ juris formâ audiendum," (it speaks of the accustomed form of law in which these parties are to be heard), "testes insuper quoscunque idoneos, ac alia quæcunque legitima probationum genera, juxta juris exigentiam, recipiendum, admittendum, jurandum, et examinandum, atque sic jurari et examinari faciendum et monendum, necnon electionem de personâ antedicti Doctoris Francisci Hare electi," (these are important words, as it appears to me,) "et decretum ejusdem, ipsumque

(*j*) *Supra*, p. 141.

(*k*) Vol. 2, p. 97.

electum (quatenus hujusmodi electio ritè et canonicè facta fuerit et extiterit) approbandum, ratificandum, et confirmandum," (so far, it agrees with the letters patent; but it goes on,) "ac si opus fuerit ac res ita exigerit, infirmandum, annullandum, irritandum, et cassandum, dictamque electionem ac ipsum electionis negotium, unà cum suis incidentibus, emergentibus, dependentibus, annexis, et connexis quibuscumque discutiendum et decidendum, et finaliter terminandum, prout de jure fuerit faciendum." So, the commission here, which sets the thing in motion, expressly gives the power; and yet the appointment of deans has been no more questioned than the appointment of bishops.

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Then we have heard of no parties intervening, and opposing the confirmation of deans; nor have we heard of parties intervening, and opposing the confirmation of bishops, except in particular cases,—one or two extraordinary or particular cases, brought under your lordships' notice. Your lordships will see, from the letters patent (*l*), that, in the case of the bishop, this is strictly guarded against; that the letters patent do not give the right to examine and annul the thing which was done, as this mandate to confirm the dean might seem to do; but that the royal mandate is to this effect, that they are "to confirm the said election, and to consecrate the said Renn Dickson Hampden, so as aforesaid chosen to be bishop of the said see, and to do, perform, and execute with diligence, favour, and effect, all and singular other things which belong to your pastoral office, according to the laws and statutes of England in this behalf made and provided." So there is no inquiry laid before them: they are not to inquire and determine, and to confirm the election, only if it is found to be properly done, and to annul it where it is improperly done: there is nothing of the kind submitted, in this case, to the commissioners. The commissioners have this charge given to them, namely, to confirm; and the archbishop is told to do all and singular other things which belong to his pastoral office, according to the laws and statutes of England. Now the statute also speaks in the same way; because it shows that, besides the mere act of confirmation,—the formal act of confirmation,—there are other things which are committed to the archbishop to do, in reference thereunto. For, in the 5th section, the act says, "and to give and use to him pall, benedictions, ceremonies, and all other things requisite for the same." So this part of the letters patent corresponds with the words in the act of parliament, and thereby commands the archbishop to do all things and use all ceremonies, and to proceed in a proper manner to confirm the bishop; the commission to confirm being given him by these letters patent.

Letters patent for episcopal confirmation more stringent than the mandate to confirm a dean.

Now, my lords, these parties, who are now applying for a mandamus, stand upon their right, and come before your lordships as persons saying they have a right to be heard. They therefore ask your lordships to grant a mandamus, that they may have the enjoyment of this right which is denied them. Now, my lords, it may be that, as clergymen within the diocese (two of them, at least), they have that general right to be heard; but the question is this:

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in sending the mandamus to these commissioners to hear them, whether the commissioners have the jurisdiction, the right, and the power to hear them. Because the parties may have a general right; they may, as subjects of this realm, have the right; they may, as clergymen within the diocese, have the right: but if the legislature, looking at other matters, for other purposes, and for graver considerations, has seen fit, in this case, to deny them the power of exercising that right, and not to provide a tribunal where they can be heard, then it must be, like all other rights under similar circumstances, a right which cannot be carried into effect. And if your lordships are of opinion, that the tribunal so constituted is of this kind, then I apprehend that your lordships would not command such a tribunal to hear them, when, in point of fact, it has no power to do so.

My lords, in adverting to this part of the subject, I beg to call your attention back again to the premises I have laid down, from all those various authorities; that undoubtedly it was the original prerogative of the crown, if not in point of form, yet in point of fact, to appoint bishops; that this was interrupted for a time; that it was restored; and, whatever the form of it might be, that it is now established. That prerogative, not being touched by the statute, must remain precisely the same. And then, what should we expect, in coming to a court that is to do this act, which is stated to be a judicial act? What should we expect, but that those officers would be employed, whose peculiar duty it is to conduct matters of form, whose peculiar duty it is to go through the formal business belonging to the archbishop? We should presume, it would be so; that if the archbishop had officers, some of whom have a jurisdiction which they are constantly exercising, before whom causes are constantly argued; and if he had also other officers, whom he could order to do this thing, who had no such jurisdiction, but who were always employed in matters of form and so forth, officers in fact, who were purely ministerial (for unquestionably some of the forms to which I have adverted are purely such);—we should conclude that the commission to do this ministerial act, would be given to this latter kind of officers. Now, my lords, I apprehend, that such is the exact case here: that when we come to look at the vicar general, who is always one of these commissioners; before whom these proceedings always take place; who, on many occasions, sits by himself, though, on other occasions, he is joined with other commissioners, among whom however he is still the chief, they being merely associated with him in doing the act;—I say, when we look at the authority and the power of the vicar general, we shall find that it exactly corresponds with all (as I have endeavoured to argue before your lordships) that would be expected under the circumstances. Now, my lords, in the first place, in proof of this point, I will call your lordships' attention to the introduction to *Oughton's Ordo Judiciorum*. It is at section 9, in chapter 3, of the *Prolegomena* (m). “Auditoris causarum negotiorumque Audientiae Cantuariensis officio (quondam) erat conjunctum illud Cancellariatibus archiepiscopi.” As these two offices were joined together, in olden time, in the same person, he was *Auditor*

The Vicar
General a
ministerial
and not a
judicial officer.

Oughton.

causarum Audientiæ Curie, and also the chancellor of the archbishop. He had these two appointments; he joined these two in one person: "Qui Cancellarius [sive Vicarius in spiritualibus generalis]"—so that the vicar general and the chancellor are the same person: he was vicar general, or chancellor—"ea quæ contentiosæ jurisdictionis erant non exercebat" (he had no power, as vicar general, to exercise any contentious jurisdiction at all), "id est, causarum inter partes, in foro contradictorio, decisionem [præterquam, quæ pro formâ solummodo ventilantur; utpote, negotia confirmationis episcoporum electionis, et similia] sed ea, quæ sunt officii meri, gerebat." So that he had no power, as vicar general, to preside over causes which were contested; but there is a parenthesis, and, in that parenthesis, the writer of this book (a book of very great authority, in matters of this kind, among us,) treats of this matter, how it happens that the vicar general seemingly presided, in such a case, in the confirmation of the bishop. He says: "Præterquam quæ pro formâ solummodo ventilantur; utpote, negotia confirmationis episcoporum electionis, et similia." So here the writer, a very great and eminent authority in these matters, tells us, that the vicar general has no contentious jurisdiction. He tells us, that still he did preside over the confirmation of bishops; and he explains that, by saying, this is a court which is only a pro formâ court; this is only a matter of form, and therefore does not go against that which I have spoken of before. Then, in the next place, he goes on to say, that the vicar general has only a voluntary jurisdiction. With that part I will not trouble your lordships; but it is necessary to call your attention to the beginning of the 11th section, though it has not precisely, at the present moment, a bearing upon my argument; but it will save my referring back to it, after I shall have referred to another book. I call your lordships' attention to this: "Nullus autem, a plurimis abhinc retroactis annis, extitit Audientiæ iudex; utpote forensis." Thus, the jurisdiction of the court of audience, he says, in his time (*n*),—and he lived about the middle of the last century,—had ceased; for, in his time, no one held this appointment at all: there was no judge appointed to the court of audience.

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I will call your lordships' attention next to another very high authority upon a matter of this description; and that is *Coke's Fourth Institute*. He is speaking of the court of audience. And the reason I called your lordships' attention to that last passage was this: because, though in *Coke's* time, the court of audience either existed, or had been more lately in existence than in the time of *Oughton*, he seems to have confounded it with the court presided over by the vicar general; inasmuch as the offices of *Auditor Curie Audientiæ*, and of vicar general, were held by the same person. But he speaks of the court of audience in this way: "This court is kept by the archbishop in his palace, and meddleth not with any matter between party and party of contentious jurisdiction." Now that does not apply to the court of audience; because it is clear, from *Clarke* (*o*),

Coke, 4 Inst.
337.

(*n*) The *Ordo Judiciorum* was published in 1738.

(*o*) *Praxis*; tit. iv. p. 6. "Auditor

vero Curie Audientiæ Cantuariensis habet in omnibus et per omnia consimilem cum dicto Officiali de Arcubus

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and from Oughton (*o*), that it had a concurrent jurisdiction with the court of the dean of the arches, and parties might appear either in one court or in the other, in many instances, as they pleased; and therefore this is a mistake for the court of the vicar general, who held this second appointment conjointly with the other, and whom he considers to be sitting in the capacity of *Auditor Curie Audientie*, when he was in fact sitting as vicar general.

Mr. Justice COLERIDGE. You are reading from the *Fourth Institute*, are you not?

Dr. Bayford. Yes, my lord: the *Fourth Institute*, p. 337. He goes on to say that the court of audience "dealeth with matters *pro formâ*, as confirmations of bishops' elections." Here we have it again; here are the two authorities; here is the great authority on the practice of our courts; and here is Coke; both treating the matter as a mere matter of form, and both stating that the judge who presided (though, it seems, my lords, Coke thought he presided in his character of *Auditor Curie Audientie*, when, in fact, he was presiding as vicar general) had no contentious jurisdiction. Your lordships will see, from Clarke, in whose days the court of audience was certainly in existence, that St. Paul's was the place where that court was held, and where, I believe, the bishops never were confirmed. (I believe, they always were confirmed in Bow Church; and it is stated in the affidavit before your lordships, that such was always the custom: I believe there has been no departure from it). Now, Clarke says this: "*Curia audientie Cantuariensis tenetur in loco Consistoriali intra ecclesiam cathedrallem Divi Pauli London (p).*" So that the court of audience once was held in St. Paul's. The confirmation always took place in Bow Church. The vicar general, as such, presided, in Bow Church, over this matter of form. As *Auditor Curie Audientie*, he presided, in St. Paul's, over matters of contentious jurisdiction, which came before him there. The same person held the two appointments. One has become obsolete, and is no longer in use. The appointment of vicar general alone survives. But in that character, I have shown your lordships, that he had no such power. Now your lordships will find, at the end of the book,—and it is more from curiosity, perhaps, than from its application to the point before your lordships, that I mention it,—but it is curious to find, that he gives the very form of confirmation (*q*), as it is quoted in all the books after his time; his preface bearing date in 1559. So that, in 1559, or shortly after, the order of confirmation, as it now exists, was known, and is appended to the work which he wrote, and which was published after his death. The preface gives the date when he finished the work, which was in 1559; but the work itself was not published until afterwards, and then by other persons.

My lords, this point has been much considered in a case to which I will call your lordships' attention, because it goes much deeper into the matter than I have as yet done, inasmuch as I have

jurisdictionem, fuitque ab antiquo (prout nunc est), vigore cujusdam specialis commissionis, vicarius in spiritualibus generalis dicti Archiepiscopi Cantuariensis."

(*o*) Who speaks to the same effect as Clarke, in tit. v. ss. 8, 9.

(*p*) Clarke's Praxis, p. 2; præm.

(*q*) Tit. cccxxix.

hitherto confined my observations to the archbishop's vicar general. Your lordships will find that the appointment of vicar general,—not merely of the archbishop's vicar general, but of that officer generally,—is of a similar kind and character, as appears from the case to which I now refer, the case of *Thorpe v. Mansell*, in *Dr. Haggard's Consistory Reports*, vol. 1, p. 4, note. It came before Lord Stowell, on an objection, that articles in a suit were in the name of the judge as vicar general, and not as official principal. The court said—(Your lordships are aware, we object to the articles, when they are informal, and this objection was taken)—The court said,—“It is not too late to take a fundamental objection at any time to the proceedings, and the question therefore is, whether the present objection can be so considered from the character of the two offices? The vicar general is the representative of the bishop, and in later times has proceeded only in matters of voluntary jurisdiction, as in the granting of licences, where there is nothing of litigation or contention between the parties.”—(Your lordships will observe that this was in the Consistory Court, and therefore not concerning the archbishop's vicar general. The other books, to which I have called your lordships' attention, applied only to the last-mentioned officer; but this case relates to a vicar general irrespective of the archbishop).—“But it appears from the authorities, that he has also a criminal jurisdiction,—a power to inquire into crimes, and punish them; but it is not stated how this inquisition is to be pursued, whether in a precise form, or as the bishop himself would exercise it in his own hall of audience, or more privately.” And therefore, your lordships see again, in the mind of this learned judge, there was a connection of the court of audience with the vicar general; and he was speaking of it, when he intimated that the vicar general would be the proper person to preside in any such court, and, in that character and in that way, might have exercised such a jurisdiction as he refers to. “I think, however,” he proceeds, “the description given of the *official principal* does almost exclusively give to him the cognizance of such offences in this court. As vicar general, I am not sure that he could exercise it. I am of opinion, therefore, that the omission is fatal, as it is clearly the official principal whose office is meant to be promoted here. I think this omission would affect the citation, and any instrument under it. I am under the necessity of dismissing the cause with costs.” So that he dismissed the articles, as being informal, (though the two appointments were held by one person), because the citation was taken out in the name of the vicar general, and not in the name of the official principal. He considered that to be a fatal error, and dismissed the articles; and he was of opinion that it affected the whole proceedings from the citation downwards. That authority, therefore, I think your lordships will see, goes further than the other books, because it speaks generally of the office of vicar general, without confining it to the archbishop's court.

Now, my lords, suppose that your lordships see the necessity of acceding to the application which is made, and grant the mandamus, and suppose the commissioners sit in Bow Church (for I presume they must sit there), and these parties appear before them.—I will

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the party, and
the nature of
the proceed-
ings.

The bishop
himself not a
party.

Indecent to
require him to
prove his own
character for
piety.

Nolo episcopari.

If articles
given in the
Church Dis-
cipline Act
precludes
inquiry.

Absence of the
party prin-
cipally con-
cerned.

A novel and
unseemly
position for a
bishop elect
to be placed
in.

pass over the inconvenience of the whole matter; because, if the commissioners are bound to hear, they must sustain that inconvenience, and all parties concerned must do the same; I therefore pass over the whole of that. But I will suppose that the parties are before the court, and are giving in their libel, which, they state, they have drawn up; and this libel alleges the unsoundness of doctrine of the bishop elect. Supposing we have come to that stage, what is the next? The next stage would be the reading of this libel, the seeing if there is to be anything opposed to it by those who appear on the part of the dean and chapter;—for the bishop is not before the court at all; he is a mere bystander; it is a cause between the dean and chapter and the opposers: the case would be, the dean and chapter of Hereford against whoever it was that appeared: that would be the way in which the case would stand. As to the bishop, he would stand aside. And I am really surprised to find, that it ever has been put by any one, that the bishop should be bound to come forward, and maintain, in the face of a court of justice, that he is a man of piety, because part of the petition given on behalf of the dean and chapter goes to state that he is of sufficient piety and learning and so forth. “Piety” is the word employed; and how would it be for the bishop to come forward, and say,—in the teeth of that which has, from the most ancient times, been considered as the words which should be in the bishop’s mouth, *Nolo episcopari*,—“I am a man of piety and learning: I call upon opposers to prove to the contrary: here I am to prove my case?” My lords, modesty must keep him back; and, therefore, the case must be conducted, on the one part, by the dean and chapter of Hereford, and, on the other, by the person who appeared to support the case in opposition to the confirmation of the bishop elect.

This, then, is the way in which the case would stand. The articles are given in, or rather the libel; for it is in fact a libel, though they call it articles in some part of the affidavit. We will suppose it to be in the form of a libel. Articles could only be given in, in a criminal suit; and then the bishop must be brought and articulated in the court. But if that were done, then the church discipline act would apply; for if we have a criminal proceeding, we cannot go on, except under that statute; and that statute gives no power to these commissioners to sit, and therefore it is impossible to get one step further, if the proceeding be by articles. But supposing the charge is given in the form of a libel, there are two parties, the dean and chapter, who have chosen to elect the person recommended to be their bishop, and the opposers; and the point in issue is, the soundness of the doctrine of a bystander. Was it ever heard that a matter essentially criminal was tried in this manner; the party principally concerned, being by the position in which he stands, excluded from the cause? However I do not say, technically, he could not come in, or that it might not be provided that he should be heard. But it would be to put the bishop in a position, in which no bishop has ever been placed before, if he should be brought before the court at all. Because he is now, by act of parliament, a bishop elect. That cannot be undone: the statute makes him absolutely lord bishop elect. I say it would put such a person in a position in which no bishop elect ever stood, previous to this time.

Now, that being so, what do we come to next? We come to the proof of the libel. If the libel, after having been opposed, is allowed to be proceeded with, the witnesses would be examined; and if the charges in the libel be not counterpleaded, there is an end of the case, and publication might take place. But those witnesses would be subject to cross-examination; and written evidence cannot be taken down in a moment. It must require some days for this evidence to be taken, according to the number of witnesses produced on the part of the prosecution (for, in point of fact, though not in point of form, it would be a prosecution). Now, I will take it still further; suppose the bishop, or rather, the dean and chapter for him, were to make an answer to this charge. He brings in his allegation, and wants to summon his witnesses; and we will suppose that there is a strong political feeling, and that the party, whom it might be desirable to summon as a witness, will not appear before the court; what is the bishop to do? what jurisdiction have the judges to force an appearance? I apprehend, if they attempted to do it, that they could only do it in the common form, by putting the party in contempt, and having that contempt signified. But, I apprehend, they might subject themselves to an action, by so doing. There must be in your lordships' recollection a case not wholly dissimilar in which an action was brought against a very eminent judge of the ecclesiastical court, and succeeded too. It was a case where the general feeling of the ecclesiastical lawyers was that the judge was correct in what he did (*r*). Now, if these commissioners were obliged to proceed to this extremity (and without doing that they could not accord justice in the case, for I have to suppose a witness to hang back; if the witnesses, indeed, were all willing, justice might be done, but I am supposing them to hang back and to refuse to come), I say, they would be putting themselves in the position which I have instanced. Only here, I apprehend the whole feeling of the profession would be against them; because the power has never been exercised in any instance; and, indeed, that circumstance alone would be quite enough to overthrow their right to do the act.

Then, my lords, again, it would be out of the power of the learned commissioners to enforce answers from the parties; and it would also be out of their power to enforce their sentence, in any way that might be necessary. I do not enter into the question, whether it might become necessary or not. But if your lordships see that parties are about to be put in the situation of being obliged to exercise a jurisdiction which never before was exercised, and if you were really to find out that the power existed in no part of the world,—(we have got all the old canonical writers)—I say, when your lordships see that the commissioners would be put in that situation, I do think you would not force them to be placed in it at all; because I submit to your lordships, it would be out of their power to do substantial justice. It might indeed be, that, in certain circumstances, they could do justice. I do not mean to say, if all the persons, whom it would be necessary to bring before that court for the inquiry, were to come,—

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Length of time required for the examination of witnesses.

No means of compelling the attendance of witnesses.

No power of enforcing answers from the parties;

or the sentence of the commissioners.

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**The other
members of
the arch-
bishop's court
have no con-
tentious juris-
diction.**

**Impossible to
conclude the
inquiry within
the statutory
period.**

**Church Dis-
cipline Act
would protect
the bishop
elect from a
direct criminal
charge of the
matter con-
tained in the
libel.**

I do not say, if there were no hindrance, that it might not be in the power of the commissioners to hear them; but I come to this, whether, supposing it was necessary, for the purpose of justice, for them to proceed to put the witnesses in contempt, or any of the parties in contempt, they would be able to do it, inasmuch as they might not be supported in the use of a jurisdiction, which had never been exercised until that very day.

Now, my lords, the only other officer of the archbishop, joined with the vicar general in this commission, who sat upon that occasion, was the Master of the Faculties. He is also without any contentious jurisdiction. And therefore, so far as those officers are concerned, so far as that court is taken to be a court, there is no power in it to do what might and probably would become necessary for the carrying out of its sentence.

Then, my lords, there is another objection. I think I have already said enough to your lordships to show, when I add that the bishop's witnesses must also be examined, or rather that the witnesses on the part of the dean and chapter must be examined, that it would be impossible to conclude the matter within the time allowed by the statute. There would be no possibility of doing so. It is hardly possible that the business could be concluded in the time, even if every party were to come forward and offer the very greatest facility. Supposing all parties to be anxious, and there were no delay, and we proceeded *de die in diem*, and the evidence was taken continuously, and persons were employed constantly, in the matter of the inquiry, it would be impossible, I repeat, to conclude it within the time allowed by the statute. I say, then, when there are these insuperable difficulties, when the statute gives no power to the persons who sit, and when it confines them to a limited time, (and these proceedings, and the forms and length of them, at the period when the statute was passed, were much more extended than they are now; for in these matters in the ecclesiastical courts, delays were then allowed, which are not dreamt of nor suffered for a moment, at the present time) to suppose that this statute ever contemplated a judicial inquiry of this sort, and yet confined the judge to the limited period which it mentions, is to suppose a thing which appears quite out of the question. Therefore, I say, there is a practical difficulty, which to me is insuperable: and, in any case, the result must be this, that if there is a judicial inquiry entered upon, such inquiry cannot be carried out or conducted within the time which the statute limits for it.

Your lordships see, it is stated in the affidavit, that the complaint,—the matter which would be contained in this libel,—arises out of the contents of certain books published in 1836. Now, my lords, supposing it had been intended to proceed against the bishop elect for this matter, in regard to any charge of unsoundness of doctrine arising from these books, he is protected at once by the Church Discipline Act(s). The Church Discipline Act limits criminal charges, to be brought against clergymen, to the space of two years. It is in the 20th section: "Be it enacted, that every suit or proceeding against any

such clerk in holy orders, for any offence against the laws ecclesiastical, shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards." Then, my lords, again, in the 23rd section, we have this: "Be it enacted, that no criminal suit or proceeding against a clerk in holy orders of the united church of England and Ireland, for any offence against the laws ecclesiastical, shall be instituted in any ecclesiastical court, otherwise than is hereinbefore enacted or provided." So that, while this act would exclude the inquiry, on the ground of time, while this act would shelter the person himself from being brought before that jurisdiction, yet, because the charge does not come immediately against himself, in the form of a criminal suit, but is to be tried between third parties, while he is to stand by (though he is to stand by to be the sufferer), his rights are to be questioned, his position is to be at stake, and all the evil which could have happened, supposing he could be brought and charged with the offence himself, must be entailed upon him. Because, in that court (supposing he could be by articles brought before that court), the question would be the same, involving the consequence whether his confirmation was to be sustained, or to be rendered null and void; whether it was to be proceeded with, or not to be proceeded with. I say, the event would be precisely the same, in regard to the effect upon him, as if he were articled before that very court, which he could not be under this statute. And this is a view of the question which does appear to me to involve an inconvenience which your lordships will consider well, before you call upon these commissioners to hear the objections in this case.

My lords, I now call your attention to a book which has often been brought under your notice, in the course of this investigation. It is *Lancelot's Institutes*. But before doing so, I will direct your lordships' attention to a passage which gives the history of that work. It is from *Irving's Introduction to the Study of the Civil Law*. Dr. Irving there gives the whole account of this writer (t); and he says, "*The Institutions of Jo. Paulus Lancellottus*, divided into four books, are inserted in different editions of the *Corpus*; and this circumstance has led some individuals, superficially acquainted with the subject, to suppose that they form an essential part of the authorized collection. They are, however, the production of a private lawyer; and having never received the sanction of the Pope, they possess no authority beyond that which belongs to the character of the author as an able interpreter of the canon law. This work was undertaken with the approbation of Paul 4: fifteen years elapsed before its completion; and *Lancellottus*, having at length submitted it to the papal censors, and lingered two years in Rome, was compelled to abandon the hope of obtaining the sanction of his holiness, Pius 4. The book was published in 1563, a few months before the dissolution of the council of Trent. The only favour which the author could obtain was that his *Institutions* might be added to the *Corpus*, but without any confirmation of their autho-

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An argument
against implic-
ating him
indirectly.

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tions of
Lancellottus
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rity."—So that this book has no confirmation whatever of authority among the Roman lawyers.—“They are sometimes inserted, and sometimes omitted; nor do they occur in that edition which we have already mentioned as the best (*u*). As they do not include the changes and modifications introduced by the council of Trent, they require the aid of a professional commentary. The *Institutions of Lancelottus* are closely modelled upon those of *Justinian*.” And then he speaks of his style. So that, in quoting this book, whatever light it may bestow on the subject, we must consider it as a book of no authority, even among the students of the canon law themselves: it is a book which has the authority of a writer who understands the subject; and, so far as that goes, it is a text book which may be of use; but it has not any recognized authority; it has never received any direct confirmation. Now, my lords, *Lancelottus*, in the chapter where he speaks of confirmation and election (*v*), says, “Nunc videndum est de confirmatione. Sciendum est itaque imprimis, Gregoriana constitutione in Lugdunensi Concilio cautum fuisse”—that was in the council of Lyons. Now, the decrees of that council, which was held in 1274, are not received here, and have no authority here beyond that of casting light upon any matters which may be of authority. Then he goes on to speak of the electors. I will not weary your lordships by reading the passages which have been so frequently brought to your attention. But I must remark this: if we are to take the book for an authority, as showing what the common law of England was (for that is the real question), we must inquire whether this book, or, rather, whether the matters which are stated in this book, ever obtained any footing in England, or ever formed part of the common law of England, and were adopted and carried into effect here. I can find no reason whatever for saying that such was the case. I can find nothing at all that goes to show that this book was ever adopted, or ever became part and parcel of the law of this land, at any time. No doubt, persons, treating of the matters which are here considered, might take this as an authority: they might use these words, and speak of the thing in the same terms; but further than that, I apprehend, the book was never used. He goes on to say, “Is autem ad quem confirmatio pertinet, diligenter examinare debet et electionis processum, et personam electi” (*w*). Now, it is quite clear, as to the process of election, that that cannot be inquired into; because the statute forbids any inquiry into it: it is to be good for all intents and purposes. So far, therefore, at least one-half of the doctrine of which he treats is absolutely excluded by the act of parliament. And as to the question, how far the other half ever prevailed in practice, really no certain light whatever can be obtained. We may guess, perhaps, that, because the form existed in Bow Church, the substance also was there; but your lordships will not grant a

The doctrine
of *Lancelottus*
in part ex-
cluded by the
stat. of Hen. 8.

And as to the
rest involved
in doubt.

(*u*) Viz. “Corpus Juris Canonici, Gregorii XIII. Pont. Max. jussu editum: a Petro Pithæo et Francisco fratre, Jurisconsultis, ad veteres codices manuscriptos restitutum, et notis

illustratum.” Parisiis, 1687, 2 tom. fol.

(*v*) Lib. i., tit. 9, in princip.

(*w*) Ib. § 5, *supra*, pp. 108, 127.

mandamus upon that conjecture. We may assume, as a matter of historical probability, that because such and such a thing has obtained where these forms were in use, therefore, where the forms were used in other places, the same thing likewise obtained. But, my lords, I apprehend, you cannot carry it one step further than that; it is a mere probability, stronger or weaker according to the authors who may be quoted, and the matters we may be talking about.—He then goes on to say, “Et cum omnia rite concurrunt, tunc munus ei confirmationis impendat:” when every thing is right, he is to confirm. “Quod si secus factum fuerit, non solum dejectendus erit indigne promotus,” (that cannot be done: the bishop remains the bishop elect: that cannot be questioned at all), “verum etiam indigne promovens puniendus.” I say, then, are these gentlemen, who come forward to oppose the confirmation of this bishop, content to be judged by their own law? They point to this proceeding, and say, it was adopted in England. But what punishment was there ever known for any opposer, if he failed in his proof? We have no record of anything of the kind; and therefore, so far as that goes, the matter fails; and the failure of the practice, in that portion of it, shows that in other respects it never obtained.

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Mr. Justice PATTESON. It is, “dejectendus erit indigne promotus.”

Dr. Bayford. Promovens—

Mr. Justice PATTESON. “Promovens” is not the opposer. “Promotus” is the person elected. I should therefore have thought the “promovens” was the person appointing.

The *Attorney General*. The dean and chapter are to be punished.

Dr. Bayford. My lords, I will call your attention next to the rule which has been laid down in these matters, and which has been given, in the simplest form that I know of, in the preface to *Burn's Ecclesiastical Law*. Speaking there of the ecclesiastical law of England, and of the way to find out what the ecclesiastical law is, and how it is to be extracted from all the materials of which it is composed, he says (x), “Therefore the business upon this head must be, to inquire, first, what is the canon law upon any point;”—Now I am much afraid that even at this moment, after all this discussion, we are rather ignorant upon that first question, what the canon law is; for not knowing it practically, having nothing to guide us, except the statements of text writers, it is almost an impossibility to arrive precisely at what the law was in this respect; because the observations of the writers are so mingled with the law itself, that, unless we were speaking of a system which we knew practically, it is hardly possible to distinguish the one from the other. Then he says,—“And then to find out how far the same was received here before the said statute”(y). Now here we are still all in the dark, in this matter; because, though we can trace to a certain extent what are

Doubtful state
of the canon
law in this
country.

Burn's rule
does not
dispel the
doubt.

(x) P. xxxi., eighth edition.

(y) Viz. 1 Eliz. c. 1, which revived the 25 Hen. 8, c. 19, confirming the validity of all existing canons, &c., not

repugnant to the laws of the realm, nor hurtful to the prerogative, till reviewed under the provisions of the act.

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the opinions of any writer, irrespectively of the question whether they form part of the canon law, strictly and authoritatively such, I say, even if we can arrive at that conclusion, still, how far those opinions have been received in this country, is a matter upon which, it appears to me, the most profound darkness reigns, in respect of the question now before your lordships. Then he goes on: "and then to compare the same with the common law, and with the statute law, and with the law concerning the king's prerogative (which is also part of the common law): and from thence will come out the genuine law of the church." Now, it appears, with reference to the first two of those, we want an accurate knowledge of what the canon law was, (not merely what the opinions of the canonists were, but what the canon law itself was,) and how far that canon law, so laid down and practised and acknowledged, was ever received in this kingdom; and it appears that, in those two points, the matter is in total and entire darkness, so far as any certainty of guiding your lordships upon the present occasion goes.

Questionable,
whether
Lyndwood's
authority be
favourable to
the opposers.

I will call your lordships' attention next to the book which we usually select for solving questions of this kind. That book is *Lyndwood*. When we wish to solve a question of this kind, *Lyndwood* is perhaps the most important writer to whom we can refer; because, being an ecclesiastical judge, he had the administering of this law, to a certain extent; and therefore, it may be supposed, he was conversant with it. He speaks in different places of the various parts of the canon law which have been introduced into practice and use, in this kingdom. In a passage to which your lordships' attention has been already called (z), at page 218, your lordships will find a note of *Lyndwood*, upon a constitution of Peckham. Now this constitution does not refer to bishops: it refers to the case of minor prelates, and to elections generally; but it has no reference to bishops, because bishops are expressly excepted from it, as your lordships have already been informed. What is the object of this note? The object of it is, to run a parallel between presentation, as stated in the constitution on which he is commenting, (presentation to a living,) and the confirmation of persons who are to be confirmed. But he says nothing about bishops: there is nothing about archiepiscopal confirmation. It is the confirmation of those, whoever they may have been, who were to be confirmed by the bishop. The note begins in this way: "Simile habes in confirmatione electionis, sive in non concordia sive in concordia fuerit celebrata, ut scilicet non teneat confirmatio, etiam per episcopum facta." So that he is speaking of a bishop confirming. He is not speaking of the archiepiscopal confirmation of a bishop, but a confirmation made by the bishop. Then he goes into a variety of matters, with which I will not trouble your lordships, because they have been brought under your notice as far as is necessary. But, towards the end of the note, he has this remark, after quoting the authority of John Andreas all through the note: "Hic tamen adverte, quod prædicta opinio Jo. Andreæ non observatur, ut communiter in Anglia." Now what exact opinion, of all the opinions, (for the note runs upon the words of John Andreas)

(z) *Supra*, p. 179.

this refers to, as not obtaining in England, I cannot tell. I can find no distinction. I can only see that a variety of his opinions are introduced into the note; and, at the end of it, he tells us, this does not apply to England, and does not obtain in England. To what precise limits he means to confine that observation, though I have read the note very carefully, and considered it as accurately as I can, I do not know. And therefore I think his observation shakes the credit of this note very considerably, and shows that we may be missing his meaning, when we think we are following it. It is not obvious what the precise meaning of the learned writer is.

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Now, my lords, I beg your attention next to the only other part of this book which appears to be important; and that is the Constitution of Othobon. Your lordships are aware that Othobon was Legate from the Pope, and, as such presided in certain councils in England; and this constitution was a matter which passed in one of the councils over which he presided, as appears by the preface (*a*). He speaks of the matter in hand thus (*b*): "*Statuimus et in virtute sanctæ obedientiæ præcipimus districtè, ut cum electionis episcopalis confirmatio postulatur, inter cætera super quibus inquisitio et examinatio procedere debet, secundum canonum instituta, illud exactissime inquiratur, utrum plura beneficia cum animarum curâ, qui electus est, antequam eligeretur, habuerit; et, si habuisse inveniatur, an cum eo super hoc fuerit dispensatum, et an dispensatio, siquam exhibuerit, vera sit, et ad omnia beneficia, quæ obtinuit, extendatur.*" So, the only matter here sanctioned is, the addition of this specific inquiry to the other subjects of investigation: they are to inquire about it, *inter cætera*; but what the other matters were, is not stated. Now this, I apprehend, is matter which cannot be inquired into now, and concerning which any inquiry would be most perfectly irrelevant, supposing it were inquired into at the confirmation of a bishop. The constitution proceeds: "*Quòd si in aliquo præmissorum is, ad quem confirmatio spectat, electum deficere sua discussione comperit, eidem nullatenus munus confirmationis impendat.*" Now, supposing the inquiry before these commissioners to have been conducted to the extent necessary for them to pronounce judgment on the evidence laid before them; and supposing them to see that it has been proved, with regard to the person who is brought before them, that objections exist to him, which would be an impediment to his confirmation, under the law as it stood in those days, and that they are satisfied of this, and pronounce judgment accordingly, and refuse to confirm him; then, what happens? Why, I apprehend, they subject themselves to the penalties of *præmunire*. I apprehend, it is laid down most distinctly, that if the archbishop refuse to confirm, (and in this case he would be refusing,) he subjects himself to those pains and penalties; and, your lordships will see, there is no provision in the statute for this case. There is a provision, where there is any difficulty in the election: where the dean and chapter refuse to elect, the king elects. But it never was contemplated that persons could come in and

Constitution of
Othobon.

By refusing to
confirm, on
proof of objec-
tions alleged,
the commis-
sioners become
liable to
præmunire.

(*a*) P. 75, *et seq.*

(*b*) P. 133. Vide *supra*, pp. 114, 181.

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argument.

Stat. of Hen. 8
does not con-
template oppo-
sition at the
confirmation.

The sovereign
as head of the
church occu-
pies the same
place which the
Pope did
before.

Policy of all
the statutes.

oppose the confirmation; and that is the only reason why that case is omitted. They considered the confirmation as following the election. Opposition used to take place at the election: it was there the opposition took place; and therefore that is guarded against. But when they came to confirmation, that was supposed to be confirming the validity of the election; and, therefore, the crown having originally the appointment, it was not necessary to go any further into the matter: they considered that the confirmation could only be hindered by the archbishop, and that other parties could not come in and impede it, but only he; and, in order to guard against the possibility of that, there is a sweeping clause at the end of the statute,—“If any of them, or any other person or persons, admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or” (supposing that none of the above apply, still we have) “any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of the due execution of this act,” then they incur the penalty of the act. It appears to me impossible to suppose, if the law was as is stated in these old writers, and if parties had been in the habit of appearing and opposing confirmations of bishops, and so forth, that in making the statute, (which was to declare the ancient rights, and to be a resumption of the ancient rights on the part of the crown), I say, it seems impossible to suppose that the framers of the act should not have been aware of that; that they should not have borne in mind that parties had the power, not only to oppose the election, but also to oppose the confirmation, and that therefore it was not enough to provide for the case of election, by enacting that the crown should step in, and itself appoint in case the dean and chapter refused to elect, without at the same time making some analogous provision for the case of confirmation.

My lords, your attention likewise has been called (*b*) to the fact, that all these matters, which went to the informality of confirmation, were capable, to a very great extent at least, if not on every occasion, of being dispensed with by the Pope. My lords, I do not go into that question, in order to quote further authorities, but simply to call your attention to those authorities which have already been quoted, for they appear most stringent upon the point, and to show it as strongly as any others I could adduce; and therefore I feel I should only be wasting time to go over that ground again. But I call your lordships' attention to this: what is the effect of all the statutes which have been discussed so fully? Why, it is, in regard to all matters of discipline of this kind, and every thing necessary to carry on the machinery—the ecclesiastical machinery—of the country, to make the king the head of the church. That is the object of all these statutes of Henry 8. That is the object of the statute of the 1st of Elizabeth. The Pope of Rome is by those statutes declared to be no longer the supreme governor of the church, and in order to enable the ecclesiastical machinery to proceed, in order that there

(*b*) *Supra*, pp. 129, 166, 169.

may be no let or hindrance or stop to it, the king, for all purposes, is placed in the position which the Pope had usurped. And when this substitution of the regal for the papal authority is accompanied with a mandate requiring the parties to perform the acts of confirmation and consecration, and when your lordships see how very wide the dispensing power of the Pope was, I think it is not too much to say, that in the case now brought under your attention, the explanation I have offered may well be accepted as covering all the difficulties (if any) which might be adduced with regard to the election or confirmation.

My lords, in the case of Archbishop *Parker*, it appears that the provisions of this statute of the 25th of Hen. 8 (c), were not precisely complied with, because there was no archbishop in the commission (d). My lords, we find, so careful were the Legislature to guard against any difficulty arising from an irregularity of the kind, that when we come to the acts of the 1st of Elizabeth, and 8th of Elizabeth, in speaking of the elections of archbishops, and so forth, the thing is precisely confirmed. We find it said, "Her highness, by her supreme power and authority, hath dispensed with all causes for doubts of any imperfection or disability that can or may in anywise be objected against the same, as by her majesty's said letters patents remaining of record more plainly will appear" (e).

Mr. Justice COLERIDGE. In the letters patent in that case, there was an express clause: "Supplentes nihilominus suprema auctoritate nostra regia," &c. (f).

Dr. *Bayford*. Your lordship will see that part of the statute is that they "shall signify the said election, if it be to the dignity of a bishop, to the archbishop and metropolitan of the province where the see of the said bishoprick was void, if the see of the said archbishop be full and not void; and if it be void, then to any other archbishop within this realm, or in any other the king's dominions" (g).

The *Attorney General*. There was then no archbishop.

Mr. Justice COLERIDGE. Is that so, Mr. *Attorney General*? I think there was an archbishop of York (h).

The *Attorney General*. He was a Roman Catholic, and could not act.

Dr. *Addams*. He would not act.

The *Attorney General*. The act does not provide for both archbishopricks being vacant (i).

Mr. Justice COLERIDGE. They were not both vacant.

(c) Sect. 5, *supra*, p. 29, n. (r).

(d) *Supra*, p. 58, n. (q).

(e) 8 Eliz. c. 1, s. 2.

(f) Vide *supra*, p. 59, n. (g).

(g) 25 Hen. 8, c. 20, s. 5, *supra*, p. 28.

(h) Nicholas Heath, Bishop of Worcester, was promoted by Queen Mary to the Archiepiscopal See of York, in 1554. He was deprived by Queen Elizabeth shortly after her accession. After his deprivation, the spiritualities of the archbishoprick were adminis-

tered by the dean and chapter until the appointment of his successor, Archbishop Young, in Febr. 1560, during which interval Parker was elected and consecrated to Canterbury.

(i) The latter part of the 5th section enables the crown, in the case of an election to an archbishoprick, to issue its mandate either to one archbishop and two other bishops, or else to four bishops. An alternative which appears to have been overlooked here.

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Dr. Bayford's argument.

Irregularity in the confirmation of Archbp. Parker.

1 Eliz. c. 1,
8 Eliz. c. 1.
A dispensing power exercised by Elizabeth.

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Archbishop of
Canterbury.

Dr. Bayford's
argument.

Dr. *Bayford*. My lords, I will call your attention to the last section of the act.

Mr. Justice COLERIDGE. Before you part from this branch of the subject, I should be glad if, for my information, you would consider this. Supposing there be a right in the crown, as you say, similar to that which the Pope had of dispensing, whether it might not be necessary, in any particular case, for the crown actually to exercise that right to dispense. In the case of the Pope, supposing for example, the canonical objection as to age, I presume the Pope could dispense with that particular incapacity. I should wish you to consider that.

Dr. *Bayford*. I am much obliged to your lordship for calling my attention to it. It would seem that, a very large portion of these dispensing powers having been committed to the archbishop of Canterbury as the metropolitan, it might well be taken that, in regard to any matters of form before him, there was a dispensing power committed to him, to make all matters of form good, for the purpose in which he was required to act. And it may also be found that, in the sentence, which is in the usual form (if it is to be called a sentence in this case), the vicar general states that he makes good all omissions, and so forth, and supplies all defects⁽ⁱ⁾. I forget the words, but they are to that effect; and it may be provided for in that way. There may be a sufficient power for him to make good any formal act which he is called upon, on the part of the crown, to do; and that is provided for in the terms of the sentence.

Dispensation
with canonical
age.

Mr. Justice COLERIDGE. Would that apply to the case, which I put, of incapacity by reason of age? ^(j) Would that be a matter of form, that could be dispensed with, under these general words?

Form of the
definitive sen-
tence, supply-
ing all defects.

Dr. *Bayford*. Your lordship will see that there is an act of parliament applying there. The words of the formal sentence I will refer to. And your lordships will remember that, in the whole course of the argument, I have been endeavouring to show that confirmation is a formal act; and therefore, in case there should be anything irregular in the way of going through such form, in regard to that, we find it provided for in the sentence, which is in the usual form, in the form which has been, I believe, invariable. "And we do, as far as in our power and by law we may, supply all defects whatsoever in the said election, if any there happen to be. And we do commit unto the said bishop," and so on. So that, in regard to that matter, as far as administering and carrying through this form goes, it appears to me to be provided for in this way.

Mr. Justice ERLE. I understood you to have given another answer to that, in the earlier part of your argument; namely, that all the power of the Pope, as the Catholic head of the church, became vested in the crown, as head of the Anglican church; and that then the positive mandate from the crown to the archbishop, to confirm the person named, was equivalent to a positive direction from the Pope, and therefore would have been proof that the objections had been dispensed with.

The origin

Dr. *Bayford*. I am much obliged to your lordship for calling my

(i) *Supra*, p. 79.

(j) *Vide supra*, p. 170.

attention to that. My lords, before I quit this subject, I should wish to draw your attention very shortly to an account of the ancient mode of election, before the canon law was placed on its present footing; because your lordships will see that this canon law did not introduce elections of bishops: it makes mention of elections of bishops; but they existed long before the canon law was drawn up in the form in which we now see it, and before many parts of it were framed. Elections of bishops existed in the very earliest times; and therefore I will call your lordships' attention to a few passages from *Bingham's Christian Antiquities*, to show your lordships the framework upon which all this machinery of the canon law had to act. My lords, in the 16th chapter of his 2nd book (*k*), he gives the acts which the metropolitans had to perform. He says: "First, they were to regulate the elections of all their provincial bishops, and either ordain, or authorize the ordination of them." And then he goes on to describe, what I will not trouble your lordships with, that originally they were present at and presided over the elections themselves. The confirmation, therefore, under those circumstances, would be equivalent to saying this: The election is completed; you have gone through the matter; it is done. It was in fact the returning officer saying, The thing is concluded. That was the origin of confirmation by the archbishop: he was the president, presiding over the election. And the writer states many instances in which that occurred. Then he says, in the 14th section, that "this power of metropolitans was not arbitrary: for though no bishop was to be elected or ordained without their consent, yet they had no negative voice in the matter." So that, originally, they were not the persons who were to reject the parties that were brought before them: "they had no negative voice in the matter, but they were to be determined and concluded by the major part of a provincial synod." He speaks at great length about the different matters in regard to the election, and how far the laity and the clergy have an interest in the election; and subsequently he states a case.—I cannot lay my hand upon the passage I was about to call your lordships' attention to, but I will state it in my own words. He says, that subsequently it appeared that the archbishop could not be present at those elections; that then the mode pursued was, that those who actually presided at and conducted the election, and knew all that took place, came with a petition to the archbishop to confirm the party, certifying to him that all had been done which would have been done supposing he had been present, and that thereupon confirmation took place (*l*). Now, my lords, I apprehend that that is precisely the introduction of the present confirmation by the archbishop. Inasmuch as he is not present, but absent, it is necessary for some parties to come and certify to him that all those things are regularly and properly done; and, upon that certificate being obtained, he proceeds to confirmation. Therefore this seems to show that confirmation is, in point of fact, a part of the election; that the confirmation is the ratifying and giving effect to the election; and that there is not, and never was, such a distinction as is attempted to be now introduced, namely, that you shall be in a position, not to

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and true character of confirmation.

Bingham's *Christian Antiquities*.

(*k*) Sect. 12.

(*l*) See Book 4, c. 2, s. 6, &c.

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Archbishop of
Canterbury.

Dr. Bayford's
argument.

Mountague's
case the only
precedent, and
of no value.

Burnet's *Hist.*
of his Own
Times. Com-
pulsory con-
secration by
Archbishop
Sancroft of
Drs. Parker
and Cart-
wright.

Præmunire.

Evils of intro-
ducing any
elements of
popular elec-
tion.

oppose the election, not to come forward there, and be heard, or do anything with respect to it; but that you may stand by, and then come forward, in a subsequent stage, and oppose the confirmation of the party.

My lords, there is only one instance, I believe, of opposition being offered to the confirmation of a bishop elect, in addition to that which is now brought before you; the instance of Jones and the mob who came to Bow Church many years ago. As to that case, I really think that it would be unbecoming in me to allude to it further, after what has been already said; because I cannot understand how the statement of Dr. Rives is to be taken in any way, except as the opinion of a certain individual expressed under circumstances where he might wish to say that which would be most pleasant to the parties he addressed. Therefore I leave that case altogether. And I now call your attention to a passage appearing in Bishop *Burnet's History of his Own Times*, vol. 1, p. 696, folio edition. He is speaking of the elevation to the see of Oxford, of Dr. Parker, whom he describes; and then he says: "These two men" (Dr. Parker, and Dr. Cartwright raised to the see of Chester) "were pitched on, as the fittest instruments that could be found among the clergy, to betray and ruin the church. Some of the bishops brought to Archbishop Sancroft articles against them, which they desired he would offer to the king in council, and pray that the mandate for consecrating them might be delayed, till time were given to examine particulars."—So that those appointments were so offensive, that other bishops came forward and prayed the archbishop to delay till he could apply to the crown.—"And Bishop Lloyd told me, that Sancroft promised to him not to consecrate them till he had examined the truth of the articles; of which some were too scandalous to be repeated. Yet when Sancroft saw what danger he might incur, if he were sued in a *præmunire*, he consented to consecrate them." So your lordships see, that by the fear of the penalties attaching upon this very statute, the archbishop of that day was prevented doing a thing which, according to Bishop Burnet, he had stated his wish to do; and was driven, against his promise, to consecrate a bishop elect, without any previous inquiry.

My lords, it does not appear to me, after what has been already stated to your lordships, and to which you have so long given attention, that I have any further matter worthy of being brought under your notice. This is a case undoubtedly involving the very deepest considerations. I, for my part, desiring the prosperity and welfare of the established church in this kingdom, should deeply lament that the mode of presenting to bishopricks should ever be called in question, so as to introduce therein the elements of a popular election. My lords, it must be obvious that, however confined the present mode may be, the introduction of such elements in elections of bishops would be open to inconveniences from which we are now shielded, and that if the elections were to be extended to those limits which in earlier times they had, when the people and the clergy themselves elected their bishops, the evils which were rife in those times would be again introduced. It

appears to me, that the only safe and desirable course, the only thing that one can wish and hope for, is, that the appointment of bishops may hereafter, as it does now, in substance remain in the hands of the crown.

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Mr. *Waddington*. My lords, it now becomes my duty to offer to the court a few observations on the same side. I must confess that, notwithstanding the very great importance of the case, and the very discursive nature of the arguments, I cannot help thinking that, when the whole is concluded, and your lordships come to a calm consideration of the case itself, you will not find it to present any difficulty whatever. It seems to me perfectly impossible that, in the utter silence of any of the authorities of our own law, and in the extremely doubtful nature of the authorities from the canon law, which my learned friend, Sir *Fitzroy Kelly*, has first to import into this question, before he can take the very first step or obtain a *locus standi* at all,—I say, I think your lordships will find it impossible, in the absence of the one, and in the doubtful language of the other, to put a construction upon the words of the act of parliament, at variance with the rules upon which statutes have been construed in these courts, contrary to the plain meaning of them, distorting many most important provisions, and rendering utterly unreasonable and absolutely unintelligible, when this interpretation is put upon it, an act which, I think, I shall show your lordships was made for the most plain and intelligible purpose, and is framed in the very best language that could be selected by the very grave and learned persons who drew acts of parliament at that time. If I should establish that, what a proposition is it, that, now for the first time, your lordships should be called on to interpose the authority of this court, in order to cause a proceeding to take place, which never has taken place in the history of this country; which my learned friend, who makes the motion, does not pretend ever has taken place, either before or since the Reformation; but which now, for the first time, as he must admit, is to bring into practice those canons which, he says, have, somehow or other, been incorporated with the law of this country, and which will control and override the express provisions of this act!

Mr. Waddington's argument.

Silence of our own law.

Doubtful nature of the authorities from the canon law.

Violence done to the stat. of Hen. 8.

My lords, it has been most justly observed by my learned friend, who so ably addressed the court, that the first question which your lordships have to determine is a question of canon law, or, rather, I may say, of ecclesiastical law; because, in this country, there is no law properly called canon law. The law, as administered here, is the queen's ecclesiastical law, into which some portion of the canon law, no doubt, has been imported, but the other and by far the greater portion has been entirely excluded from it. This observation of my learned friend was a most just one undoubtedly, because the sole ground of my learned friend Sir *Fitzroy Kelly's* argument is this—

As to the authority of the canon law here.

Lord DENMAN. Will you allow me, Dr. *Bayford*, to ask the name of the case which you quoted from *Burnet's Own Times*?

Dr. *Bayford*. I can hardly say that it is a case. It is an

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Archbishop of
Canterbury.

Mr. Wadding-
ton's argument.

Strictures on
Sir F. Kelly's
line of ar-
gument.

Statements of
English ca-
nonists res-
pecting con-
firmation.

And of foreign
canonists
The Decretals.

What parts of
the canon law
were received
and are now
in force in this
country.

Coke, *De Jure
Regis Eccle-
siastico*.

historical matter. It was the case of Dr. *Parker*, bishop of Oxford. Sancroft was the archbishop. It is in page 696, in the year 1686.—I am sorry to have misled your lordship, but it seems to have been Dr. Cartwright.—They are both mixed together in the same paragraph.

The *Solicitor General*. It is in the Oxford edition of *Burnet* (l).
Mr. *Waddington*. My lords, I was observing what had been observed before; but it is so important to my argument, that I will just repeat it: that the very foundation of Sir *Fitzroy Kelly's* case rests upon showing what were the provisions of the canon law, because the mode of his argument (which I hope I shall not misrepresent) is this. He finds, in the confirmation of bishops, under this act of parliament, that certain forms have been observed, one of those forms being the citation of opposers, who are told to come in, and informed that if they come they shall be heard. That is the strongest form, the form most in his favour, and that which he relies upon most. He then looks at *Gibson's Codex*, and other English canonists writing upon this statute; and there, in the notes, he finds that, in speaking of those forms, they have mentioned what, in their judgments, was the old canon law upon the subject; no one of them, however, saying that it was the law of England, or that it ever had been practised in England, but simply stating, by way of annotation, that such had been the ancient canon law. He refers likewise to certain other authorities,—foreign canonists,—and also to the actual Decretals, to which I will call your lordships' attention, and upon which my learned friend relies. Now, my lords, unless my learned friend can show that those Decretals had been adopted, and had been part of the law of this country, and acted on in this country, it is impossible that he can stir one step; because he says, You are to look at the forms, and you are to look at the Decretals, to determine what those forms meant, supposing the ceremony to have been performed under those Decretals. Then, having ascertained that, you are to say that the confirmation in this act of parliament, without reference to the rest of the same act, means confirmation in the mode pointed out by those Decretals, which, as he says, (and says justly,) involved undoubtedly a power of rejection. Whence he concludes that such is the interpretation of the word "confirm" in the statute, that this election must be declared void, and that the party is *dejiciendus*, though, I suppose, he will not go on to say that the opposing party is *puniendus*.

Now, my lords, here, in order to prove this part of his case, the obvious course of my learned friend was to show what parts of the canon law were received in this country. I will cite to your lordships, from a very high authority, what is said upon the subject, an authority well known to your lordships, in 5 *Coke's Reports*, which appears in the form of a preface, and in reality is a treatise *De Jure Regis Ecclesiastico*. I am citing from page 32 of the preface? The preface is, in reality, a short report of a case (m), with a dissertation

(l) Hist. of his Own Times; Vol. 3, p. 137, of the Oxford Edition of 1823.

(m) Caudrey's case, 5 Rep. 32 b.

upon the king's ecclesiastical law. This is what he says: "If it be demanded what canons, constitutions, ordinances, and synods provincial, are still in force within this realm; I answer, that it is resolved and enacted by authority of parliament, that such as have been allowed by general consent and custom within the realm, and are not contrariant or repugnant to the laws, statutes, and customs of the realm, nor to the damage or hurt of the king's prerogative royal, are still in force within this realm, as the king's ecclesiastical laws of the same." Therefore there must be evidence that they had been allowed by general consent and custom within the realm; and they must not be to the damage or hurt of the king's prerogative royal, or the statutes of the realm. Those are the only ones which are still in force. Then it says, "Now, as consent and custom hath allowed these canons, so no doubt by general consent of the whole realm, any of the same may be corrected, enlarged, explained, or abrogated." Therefore, my lords, they depend entirely upon the general custom of the realm, in the first instance; they must have been allowed and acted upon here. And, besides that, they must contain nothing contrary to the general law of the country; above all, nothing contrary to the king's prerogative or to any statute. And my learned friend must show that those canons upon which he relies, are in that position. But, in the first place, do those canons apply to the queen's bishops at all? I have been furnished by my learned friend, Dr. Twiss, (who I am very sorry cannot address the court) (*n*), with the original Decretals, which are of course the proper and best evidence of what the law was. I will refer your lordships to the passages bearing upon the question. One of the most important of them is to be found in the Decretals of Gregory 9, (in the *Corpus Juris Canonici*), book 1, title 6, c. 44. This was a Decretal made in the year 1234. I certainly was very much surprised to find that it does not in terms apply to bishops at all; and, as far as I can understand, it does not in reality apply to them; for your lordships will see that the word there used is not *episcopi*, but *prælati*. And I understand that, throughout the whole of these books, *prælati* are perfectly distinct from *episcopi*; that they refer to abbots and to superior clergy of an order inferior to *episcopi*; and that when bishops are intended, *episcopi* are always mentioned. In this Decretal, upon which my learned friend relies, you will find that the part upon which he rests his argument is confined to *prælati*, without mention of *episcopi*; and it applies therefore to some other parties, who have no reference to this question. There is first the title, which is no part of the Decretal, and therefore I will not read it. That uses the word *prælatus* only. Then comes the Decretal itself; and it says, "Nihil est quod ecclesiæ Dei magis officiat, quam quòd indigni assumantur prælati ad regimen animarum." That, I imagine, is not the way in which bishops would be spoken of:—"indigni assumantur:"—I understand that a bishop never would be described in that way, and never is. Then we proceed to the part which my learned friend says he relies on. It says, "Volentes igitur

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The authorities cited from the canon law, do not apply to bishops.

Decretals of Gregory 9.

Prælati.

(*n*) Vide *supra*, p. 121.

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Canterbury.

Mr. Wadding-
ton's argument.

huic morbo adhibere necessariam medelam, irrefragabili constitutione sancimus, quatenus, quum quisquam ad regimen animarum fuerit electus, is ad quem pertinet ipsius confirmatio, diligenter examinet et electionis processum, et personam electi." That is the person to whom it applies, and it does not refer to a bishop at all, under the description of "electus ad regimen animarum." My lords, that certainly was a matter which took me by surprise; because, though I know very little of these subjects, I imagined that the writers whom my learned friend has cited (*o*), were somewhat more correct than in this instance they appear to be; for here we have this very Decretal, upon which the whole matter is founded; and, except what is to be collected from them, there is no evidence that it was ever received in this country; but when we come to consult that Decretal itself, we find that it does not, in reality, speak of bishops, but uses words which are not, in the common language of the Decretals, applicable to bishops at all. Therefore here comes the first question which you are to decide. Can my learned friend prove that this canon uses language ever applied to the case of a bishop (which I defy him to do); or, secondly, that it was ever received and acted on in this country? This is my first observation on the first Decretal which my learned friend relied on, namely, the one which was to make the confirmation void.

There is another Decretal, to which I will now call your lordships' attention; and it is most singular that it also does not mention bishops. It is one on which my learned friend must rely entirely, because the first, even if it did apply to bishops, does not say that the confirmation shall be void. And it is clear, unless my learned friend can make out that this present confirmation is void, that there is a subsisting judgment, and it is impossible for your lordships to give him a mandamus.

Now then, my lords, we come to the other Decretal, which is the Decretal of *Sextus*; and it is cited in *Gibson*, as the authority upon which he states, that if the parties are not called, and the "*negotium*" is not made matter of discussion, the confirmation is void (*p*); which, I apprehend, does not bear out the meaning put upon it by my learned friend, Sir *Fitzroy Kelly*, that it necessarily imports a trial of the merits of the bishop elect. Still it would give him an argument, upon which he may contend that such is the case. This Decretal was also cited by *Lyndwood*, as a Decretal of *Sextus*; and it is found among his Decretals, book 1, title 6, c. 47. I cite it from the *Corpus Juris Canonici*. It was made at Rome in 1298. It is altogether silent as to bishops. It is in general terms. It does not mention any particular spiritual person; but I understand (I certainly cannot go through all of them at the present moment, but I understand) that all the previous Decretals, all indeed which either precede or follow it, apply to inferior officers of the church, and to persons below the dignity of a bishop. And in this Decretal, which is so

Comment on
Sext. Decretal,
lib. 1, tit. 6,
c. 47.

(*o*) *Supra*, pp. 108, 109.

(*p*) *Vide supra*, p. 114.

much relied on, the word "episcopus" is not to be found. It is in perfectly general terms. It begins "Quoniam, electione non in concordia celebrata, superior ad quem electionis ipsius confirmatio pertinet, consuevit interdum sue confirmationis celeritate, praeferens cupiditatem propriam juri, et inordinatum affectum etiam aequitati, competitorem aliquando, ubi alius, vel eos, qui se volunt opponere, quando electus est unicus, supplantare, dum, nullis vocatis et non discusso negotio, per repentinam confirmationem cito, contra doctrinam Apostoli, imponit manus electo: nos, volentes"—and so on. It decrees that those confirmations shall be "irritas et inanes." Now I apprehend that language of that kind would not be applied to the superior officers of the church, (to archbishops, for instance,) without expressly designating them. And the context, which also, I understand, will bear me out, shows that it has not any application whatever to bishops: at any rate, bishops are not mentioned. And it is for my learned friend to show, by some much stronger arguments than the mere statement of text writers, (*Lyndwood*, for instance, who is notoriously an incorrect writer, and as to whom, it is stated by Lord Holt, in one of his judgments, which I know perfectly well, though I cannot refer to it now, that not half of what is found in *Lyndwood* is law), it is for my learned friend, I say, to show, that bishops are there referred to.

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Mr. Waddington's argument.

Lyndwood, an incorrect writer.

Therefore, how do we stand upon this preliminary question, as to the canon law? It is not suggested that it has ever been acted on. My learned friend cannot point out a single case, either before the Reformation, or since, where there has been, in fact, any investigation of the nature which he calls for. He cannot point to a single text writer of the English law, who says that there has been such an investigation.

No instance of an investigation of the kind contended for.

(The observation of Lord Holt, to which I alluded, is to be found in a case in Lord Raymond, which I shall have to cite for another point. Lord Holt says, "One-half of what one finds in *Lyndwood* is not the law of the land" (r)).

Lord Holt's opinion of Lyndwood.

Now, my lords, not only it cannot be shown that such an investigation as this ever took place, but the silence of the text writers upon the subject, and the language in which they speak of the early confirmation of bishops, show, almost irresistibly, what they consider to be the law, namely, that there was no pretence for putting such an interpretation upon this statute. Their view of it was, not that it merely gave the king power to appoint a person whose qualities were to be investigated, and who might be rejected from the situation in which the crown had placed him, but that it gave an absolute and complete power to the crown. That is the doctrine unquestionably of Coke, in the two passages in which he speaks of the matter, and which have been cited already by my learned friend the Attorney General,—or one of them at least (s). I will not read the second to your lordships, because it is almost

Doctrine of English text writers, adverse to the right of inquiry.

Coke.

(r) In *Rex v. Raines*, 1 Ld. Raym. 363.

(s) *Supra*, p. 126.

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Archbishop of
Canterbury.

Mr. Wadding-
ton's argument.

Originally,
absolute power
of appoint-
ment of bishops
was in the
crown.

Interfered with
by charter of
King John.

After which,
the Pope
acquired the
right of con-
firmation.

Blackstone.

The stat. of
Hen. 8 restored
the ancient
right of the
crown.

identically in the same words: but the references are as follows. The first is *Coke upon Lyttleton*, 134, a: the other is 344, a, in the 2nd vol., where he repeats, in precisely the same terms, that originally, by the ancient law of England, the appointment of bishops was absolutely in the crown, that there was no confirmation at all, but that the investiture was by the crown *cum baculo et annulo*. This continued to the time of king Henry 1, when there was a violent contest between him and the Pope. This of course was contrary to what was going on in the rest of Europe, where the Pope had obtained the right of confirmation, which gave him, in effect, the right of nomination: at least, he had the power of making the parties submit to his terms before he confirmed them. This contest, according to all our writers, continued to the time of John, in the year 1215, when the charter was granted which your lordship referred to. The terms of that charter are most important, because the effect of it was to put matters in precisely the same situation as they remained in till the passing of the statute of Henry 8. The terms of that charter were these (t): that the crown should grant a licence to elect, to the dean and chapter of the cathedral, or to the abbot and monks of the convent, as the case might be. They could not elect without a licence; but the hypothesis was, that the election was a free election. There was a *Congé d'élire*, but no letters patent appointing and ordering them to elect a particular person; and the hypothesis of the law was, that the election was free; but the king had a veto. Then the Pope got the right of confirmation; which he undoubtedly retained till the passing of the statute of Henry 8. What use he made of it, your lordships will see by the preamble of this statute. But such is undoubtedly the history of the right of appointing bishops, till the time of the passing of the statute; and all our writers, including Sir *William Blackstone*, in the passages cited by my learned friend, Mr. *Hill*, yesterday (u), treat the statute as passed with the intention of recurring to the ancient state of things, and of giving the crown the actual nomination of bishops. And indeed it would have been a most extraordinary thing, for such a monarch as Henry 8, when he had experienced the effect of allowing the confirmation of bishops to be in other hands, when he found that it in effect amounted to a veto upon his own power, when he was remodelling the whole system, and getting rid of a foreign person who had been a check upon the royal power, and had possessed the means of imposing a veto upon his appointment,—it would, I say, be most extraordinary that he should pass an act which gave precisely the same power to one of his own subjects, to one appointed by himself. Is it likely that Henry 8 would have allowed an act to pass which permitted one of his own subjects to put an absolute veto upon his will, and control what he had done in the exercise of his prerogative? I say, the proposition itself is monstrous. It has never entered into the head of any human being to maintain such a proposition. That is clear,

(t) Vide *supra*, p. 125, n. (p).

(u) *Supra*, p. 200.

from what is said by *Coke* and other text writers. There is not a dictum to be found, that after the parties, acting under this statute, have made an election, there was a possibility of questioning it by any human being; and it will be for my learned friends presently to show your lordships, upon what principle you can now be called upon, for the first time, to introduce such a doctrine into our law.

But before I come to the 25th of Henry 8, I will just observe upon the statute which preceded it, the 23rd of Henry 8; because that was the first alteration that was made. That was a sort of provisional alteration, subject to a treaty to take place between the king and the Pope (*v*). But it put matters in a state, which were not very satisfactory to either party; because, although it provided against an abuse of the power of the Pope, it did not exclude him entirely from interference, but it only said, that if the parties were delayed, then the king should have an absolute power of appointment. And it becomes very important to see if, even in this first statute, there is a shadow of ground for supposing that the king's appointment could be reviewed; because, if it is clear, from the 23rd of Henry 8, that the king was, in certain cases, to have the absolute appointment, what an extraordinary supposition it is, that, two years afterwards, when he came to make this act complete, and to get absolutely the right of the Pope, and also to do what had never been done in law before, namely, to set aside the right of free election by *Congé d'élire*, he should have conceded to his subjects the power of putting a veto upon his acts! I say, what had never been done in law before; for your lordships will not fail to remember that, up to the time of the passing of the statute of the 25th of Henry 8, the election was, in the view of the law, a free election: the king had nothing but a veto. And, therefore, though Sir *Fitzroy Kelly* is correct, when he says, that one great object of the 25th of Henry 8 was to get rid of the interference of the Pope, it is evident that another great and most important object was to get rid of the freedom of election altogether, and to do exactly what this act is said by all the text writers to have done, namely, to revert to the old state of things, when the absolute and complete nomination, uncontrolled by any other person whatever, was in the crown.

Now the provisions of the 23rd of Henry 8 are these. The parties were still to be allowed to go to the Pope for all the bulls; which were bulls of confirmation and consecration; the Pope investigating, as he thought proper, their qualifications. There is a long statement in *Van Espen* (*w*), as to the mode in which those investigations were supposed to be conducted. Whether they were really so, I do not know. It appears the Pope sent letters to certain parties, to investigate the life and manners of the bishops who had been elected by the deans and chapters, and who had been presented to him by the king to have their bulls. Your lordships will find, in the statute of the 23rd of Henry 8, the mode in which the election proceeded. The king issuing a *Congé d'élire*, the election went on;

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Intermediate stat. of 23 Hen. 8, a preparatory step towards a complete restoration of the royal prerogative.

Under which stat. the Pope had a limited power.

Van Espen.

(*v*) See the statute, *supra*, p. 31, n. (*s*).

(*w*) Part. i., tit. xiv.

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and then, if the king assented to it, as he generally did, he presented the person chosen to the Pope for his bulls; and then came the Pope's turn, to give them, upon such conditions as he thought proper. It appears that Cranmer paid 900 golden ducats for his bulls (x): I do not know what other parties may have usually paid. That was allowed to remain under the statute of 23rd of Henry 8, with this qualification enacted, that if the parties presented to the crown, the crown having assented to the election of the dean and chapter, were delayed by the Pope, and had not their bulls after a reasonable time, then the appointment should be absolutely in the power of the crown. Not that any ceremony of confirmation was to go on, either in form or in substance, or that there was to be any further test, either of the election or the *persona*; but the crown was to appoint absolutely at once. "If any person being named and presented, as aforesaid, to any archbishoprick of this realm, making convenient suit, as is aforesaid, shall happen to be letted, deferred, delayed, or otherwise disturbed from the same archbishoprick, for lack of palls, bulls, or other to him requisite, to be obtained in the court of Rome in that behalf, that then every such person named and presented to the archbishop, may be and shall be consecrated and invested, after presentation made, as is aforesaid, by any other two bishops within this realm, whom the king's highness, or any of his heirs or successors, kings of England for the time being, will assign and appoint for the same" (y). If the archbishop was delayed in his bulls, therefore, having regard to what had passed in England, to the king's assent to the election, and to the presentation to the Pope, the archbishop was to be consecrated immediately, without any ceremony of confirmation, or any pretence for inquiry into the merits of the election. The same was enacted as to the election of bishops. If any bishop, presented by the king, should be delayed, in that case also there was to be an order given by the king to some archbishop to consecrate him,—not to confirm him;—and there was to be an end of the matter, without any previous inquiry.

Stat. 25 Hen. 8.

Now my learned friend has to contend, the law being so in the 23rd of Henry 8, that, in the 25th of Henry 8, a statute was passed, abridging the power of that monarch, and actually delegating to an archbishop, inferior to himself who was at that time declared to be the supreme head of the English church in all matters spiritual whatsoever,—(I will read your lordships the terms of that statute),—my learned friend has to contend, that that monarch delegated to an inferior person in the same church the right of examining the fitness of a person whom he himself had selected, who had been elected by the dean and chapter, and of whose election he himself approved. That is what my learned friend has to make out, before your lordships can for a moment think of making this rule absolute.

My lords, it is important to refer very shortly to the words of the act in which the king was declared to be the head of the church (z).

(x) Gibs. Cod. 105, n.

(y) 23 Hen. 8, c. 20, s. 2; *supra*, p. 23, n.

(z) The first act is the 26 Hen. 8,

c. 1; which was repealed by 1 & 2 P. & M. c. 8, and revived in substance by 1 Eliz. c. 1.

It will be found in *Caudrey's case*. Sir Edward Coke takes it from the statute of the 1st of Elizabeth (a), in which it was afterwards recited. It is said that this is the effect of it: "And it was then also established and enacted by the authority of that parliament, that such jurisdictions, privileges, superiorities, and pre-eminences, spiritual or ecclesiastical, as by any spiritual or ecclesiastical power or authority had heretofore been, or might lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities, should for ever, by authority of that parliament, be united and annexed to the imperial crown of this realm." And then the queen is to appoint commissioners, who are to execute those powers. That, your lordships know, was done afterwards. The commission remained till the time of Charles 1 or Charles 2 (b). It is impossible, my lords, that language can be found which more expressly shows that all the powers which the Pope had exercised, and might lawfully exercise within the realm of England, were transferred by this statute to the sovereign. And yet, my lords, it is in this state of things that we come to the statute upon which my learned friends now ask your lordships to put the interpretation they contend for. I will now address myself to that point. Your lordships will observe, as I said before, that, up to the time of the passing of this statute, the election, in all cases, was by the dean and chapter; and that it was considered a free election. What was the object of the statute? What was the principal object? It was not only to prevent all foreign interference, but to give the crown the absolute appointment. And how did the statute effect this? It effected it, by taking away the freedom of election of the dean and chapter. It would be a most singular thing if, in a statute which took away the freedom of election in the most arbitrary manner, by abrogating the charter of King John, and which vested the appointment in the crown, (according to the recitals in the statutes of the 25th of Henry 8, and the 25th of Edward 3 (c), that anciently the absolute right of appointment to all bishopricks and archbishopricks was in the crown),—it would, I say, be most marvellous, if that had been done, without taking pretty good care that such a provision should not be met and defeated by resistance which could by any possibility be effectual; because it is clear, from this statute, that resistance was contemplated. And therefore it is enacted, not only that if the dean and chapter refuse to obey the letters missive, and do not elect the person recommended within twelve days (there is very little time given to them), they shall incur the penalties of *premunire*; but also that the crown shall then proceed to appoint. And your lordships will see, that that is the case which is first

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Stat. 1 Eliz. c. 1, making the sovereign head of the church.

Which, in effect, transferred to the crown all the powers previously exercised by the Pope.

One object of stat. 25 Hen. 8 was to restore the ancient absolute right of the crown.

How effected.

(a) C. 1, s. 17. *Caudrey's case*, 5 Co. 33 b.

Car. 1, c. 11.

(b) The High Commission Court was abolished in 1641, by stat. 16

(c) Stat. 6; "the Statute of Provisors." Vide *supra*, p. 166.

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ton's argument.

Argument
from the pro-
vision, in the
case of the
dean and
chapter re-
fusing.

provided for in the statute ; I mean the case in which the dean and chapter shall refuse. And, no doubt, their refusal was contemplated ; because, before stating what shall be done where the dean and chapter comply with the mandate, and elect the person recommended by the crown, the statute begins by providing for the case where they shall refuse ; for which refusal they incur the penalty of *præmunire*. And it is from an understanding of the first provision that we infer what is the principle of the statute, namely, whether it was meant that the appointment of the crown should afterwards be called in question, or whether it was intended that it should not be called in question. Is there any confirmation required, where the crown itself appoints ? There is not. If the dean and chapter are contumacious, and incur the penalties of *præmunire*, by not electing within twelve days, the crown is placed precisely in the same position as it was by the statute of the 23rd of Henry 8. By that statute, if the Pope refused to give bulls, the crown was at once to appoint by letters patent, and to order the archbishop to invest and consecrate the party. There is no ceremony ; there is nothing to be done ; there is no possibility of any one interfering with the appointment of the crown. The statute absolutely puts an end to all inquiry. This case, therefore, is precisely the same case as was contemplated by the statute of the 23rd of the same king ; only, in this case, it is necessary that there should be an appointment by the crown, because there has been no previous election ; but in the other case (under the 23rd of Henry 8) no appointment by the crown was necessary, because there had been an election, and the party had been presented to the Pope. But the principle is the same in both, namely, that, in the one case, having got rid of the interference of the Pope, and now, in the other case, having put an end to the right of free election by the dean and chapter, the crown shall appoint absolutely, without any further question.

The case of
the dean and
chapter com-
plying con-
sidered.

Why confirma-
tion required,
in that case.

Then comes the case where the dean and chapter perform their duty, and obey the direction contained in the letters missive. And upon that the whole question turns ; because there we find, for the first time, the ceremony of confirmation. And now, my lords, perhaps my learned friend will ask, how do I account for this, that, when the crown absolutely nominates, in default of the chapter obeying the mandate of the crown, no confirmation is required ; but that confirmation is mentioned, where there is an actual election ? I can account for it very easily. Where the form of election was not preserved, the form of confirmation would not be required : where the form of election was preserved, the form of confirmation would be required. Where the appointment is by the head of the church, the form of confirmation would be absurd. That is the reason of the distinction.

Looking at the statute upon that principle, nothing can be more plain. It was determined, for some reason or other, to preserve the form of election ; but the election, being made by inferior parties in the church, would require confirmation by the head of the church, or by some person superior to the persons electing. About that there can be no doubt. And, therefore, where an election in point

of form remained, it was decided that there should be a confirmation in point of form. But where there was an appointment by the head of the church, all necessity even for a formal confirmation was at an end. And that, my lords, I submit, is undoubtedly and clearly the key, by which the whole statute may be made perfectly plain, perfectly intelligible, and perfectly consistent. Whereas, upon my learned friend's interpretation, it would have serious inconsistencies, and, indeed, absolute repugnancies; so that it would be impossible to carry it into effect at all, without having two distinct classes of bishops. Or perhaps the same bishop may be first appointed by the crown, the dean and chapter refusing to elect him; and afterwards he may happen to be translated; and then the dean and chapter may elect him, and he may have to undergo an investigation, in which his whole life, his doctrine, and even his legitimacy, may be contested by adverse parties, to any extent, to any number; at least, the number being only limited by the number of clergy in the diocese, or of other persons having either a spiritual or a temporal interest in opposing his appointment.

Now, my lords, if I am right in saying, that the previous mode of election, and the abrogation of that mode in substance, but the preserving it in form, gives a key to the principle of the ceremony of confirmation, in the 5th clause, then the whole act is plain and intelligible. In the first place, there is to be no election at all, in reality: there is to be an election in form: we will call it, if you please, a sham election. But the parties may refuse to elect: if they do, the crown appoints at once. If they go through the election in form, then it shall be followed, as it naturally would be, by confirmation in point of form. If I preserve one form, I will preserve the other. That is the plain and clear meaning of the act. And your lordships will undoubtedly, following the usual and invariable mode of construing statutes in this court, take the plain and ordinary meaning of the words; for the rule, which has been frequently laid down by the most eminent judges is, that statutes are to be expounded according to the fair and ordinary meaning of the words, unless such a principle leads to some monstrous inconsistency with other parts of the statute, in which the same words are to be expounded; or unless it leads to some consequences, which are manifestly at total variance with the general scope and purview of the act. Here, I say, the construing of the words of the act in their literal and natural sense, is the only way in which they can be made consistent with the scope of the act. But what my learned friend calls upon you to do is, to construe them out of their natural sense; to prevent the sense of them; to make them say something contrary to what, according to their literal and plain and fair meaning, they actually do say; and this for the purpose of producing contradictions innumerable; for the purpose of making out that an election, which the act says shall be good and valid, would be bad and invalid. For what is the use of an election, if the merit of the party, his learning, and his whole life, can be called in question immediately afterwards by another party? It is to introduce another principle. The appointment by the head of the church is to have a veto placed upon it by an inferior person in the same church.

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Inconsistencies involved in the right of opposition contended for.

Consistency given to the act, by holding the confirmation to be merely formal.

Established mode of construing statutes to be observed here.

An appeal from a superior to an inferior

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ton's argument.

authority,
against all
principle.

Van Espen.

In the 14th
century the
Pope got all
confirmations
of bishops
into his own
hands.

The King of
England, in
these matters,
holds the place
of the Pope.

The act makes
the election
good to all
intents.

That, my lords, is unheard of. Who ever heard of such a doctrine as that? It is laid down in all the authorities, that when the Pope appointed a bishop himself, there was no confirmation, or anything of the sort: he consecrated him immediately. It is said so, in distinct terms, in *Van Espen*, p. 98, in the title *De Confirmatione*, where the writer is discussing the question how it happened that the Pope got the confirmation of all the bishops in Europe into his own hands (*d*). It appears that the practice first began in the fourteenth century; that the old method continued during the first thirteen centuries; but that, about the fourteenth, the Pope contrived to get the confirmations into his own hands. And *Van Espen* says, in the 9th section of this chapter (at p. 69), "*Licet vero hæ pontificiæ reservationes quoad episcopatus et prælaturas, sive per concordata sive per indulta ac privilegia regibus concessa, quoad nominationes et electiones ad cathedrales ecclesias, fuerint in multis restrictæ; scilicet reservando ipsis capitulis canonicas, electiones, uti contigit per concordata Germaniæ; vel jus nominandi regibus ac principibus indulgendo: tamen confirmationes Romano Pontifici hætenus reservatæ manserunt; nec quidquam juris metropolitans restitutum est.*" Therefore, at that time, all the confirmations were in the hands of the Pope; and nothing had been restored to the metropolitans, in any part of Europe. Then he says, a little higher up: "*Pariter jus confirmandi episcopos metropolitans ademptum, et sedi Apostolicæ fuerit reservatum. Indignum quippe credebatur, ut a Romano Pontifice ad episcopatum designatus, a metropolitano confirmationem petere et accipere juberetur. Quid enim id aliud, quàm nominationem pontificiam metropolitani judicio probandam vel improbandam subicere?*" Now, that is the principle of the church; and the king of England is placed, undoubtedly, for all purposes of the appointments of bishops and archbishops, in the room of the Pope. If he appointed bishops himself, no confirmation, even in form, was necessary. If his appointment under the statute was obeyed, if his letter missive was obeyed (which, in point of form, was an election, though, in point of fact, it was an appointment), the form of confirmation was retained. It would have been most monstrous, nor can any one, I am sure, carefully looking at what was the intention of the legislature, suppose that the selection of the head of the church was intended to be controlled and governed by the archbishop, who was himself an inferior person.

Enough, I apprehend, has now been said, with respect to this act of parliament, to show what appears to be the fair and real interpretation of it, and to satisfy you that my learned friend has absolutely done nothing, that he has not even established a *locus standi*, to show that there is any rule of law to which he can refer, to turn it from its ordinary meaning; and that, even if such a rule of law could be referred to in any case, it certainly could not in this; because the whole effect would be to throw the act into complete confusion, and absolutely to repeal the provision which in express terms says, that the election by the dean and chapter shall be valid to all intents and purposes. How can it be valid to all intents and

purposes, if the party is absolutely to be degraded and deprived? For, my lords, by this election, he has sworn fealty to the crown; he is the bishop elect; all that is distinctly laid down in the act. My learned friend must take it, either that the party elected is to retain the dignity of lord bishop, having sworn fealty to the crown, or that the archbishop shall stop him, and that he shall remain in the position of being an elect bishop, and continue so, because the statute makes the election good to all intents and purposes. The crown cannot make it void, after that. The crown is bound by the act. The crown cannot proceed to another election. It is an impossibility. When the crown has nominated; when the dean and chapter have elected; when the crown has given its assent; and the bishop elect has given his assent; the election cannot be set aside by any human power. It is an utter impossibility, unless he should be deprived. He may be deprived, of course; which has nothing to do with setting aside the election. But, as far as the election goes, it cannot be set aside; and, until deprived, he must remain elected. Then my learned friend must either contend that the bishop elect is to remain in that condition for the rest of his life, (a proposition which I think he will hardly venture to maintain,) or he must take the words of the canon law, and say, that they have the power "*deji cere*." My learned friend must call upon your lordships, by your construction, to repeal these words of the statute which say, that an election under that statute shall be good and valid to all intents and purposes.

With these observations, I shall leave the statute. It is almost unnecessary to dwell upon the subsequent statute of Edward 6 (*e*), which really shows beyond all doubt, that I am right in the construction of the statute of Henry 8, namely, that the object was to make the crown the sole appointer of bishops. No one has suggested that the statute of Edward 6 was intended to alter the law upon the subject. Its professed design was to get rid of a form or shadow. And, no doubt, it is a matter of much regret that the old statute of Henry 8 was re-enacted, instead of merely repealing the statute which repealed the statute of Edward 6 (*f*). But that statute of Edward 6 shows, in language not to be mistaken, what the law was, and considered to be, at that time. It shows that all bishops were intended to be on the same footing, and not that some bishops, when they had been appointed by the crown, were to be subject to this ceremony (which, I must say—without going further through the subject—would appear to me to be of the most vain description, and of the most harassing and vexatious and unsatisfactory nature), not, I say, that some were to be subject to this ceremony, and others not, but that none were to be subject to it; and that the appointment of the crown was to be conclusive in all respects.

I should like my learned friend to inform me of any case, in the English law, where the appointment of the crown, as regards any office, has been subject to appeal to any other person. Is there any such principle of law? It would be contrary to all legal principle,

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Absurdity of party remaining perpetually a bishop elect, if rejected from confirmation.

No possibility, in such a case, of setting aside the election, and choosing another person.

Stat. 1 Edw. 6, c. 2, shows the intention to have been to make the crown absolute in appointing bishops.

Contrary to legal principle and precedent to subject crown's ap-

(*e*) 1 Edw. 6, c. 2. Vide *supra*, p. 42, n. (*a*).

(*f*) Vide *supra*, p. 29, n. (*r*), *ad fin.*

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ton's argument.

pointment, in
any case, to
appeal to
another person.

Archbishop, if
bound to
inquire, must
still have a
discretion as
to whom he
will hear.

No mandamus
to the Eccle-
siastical Courts
where they
have merely
mistaken the
ecclesiastical
law.

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for a moment to suppose, that where the crown has exercised a mature judgment upon the fitness of a person to fill any office, either spiritual or temporal, and has appointed him to that office, any one is to put a veto upon the crown's appointment, and that by the mere exercise of his own judgment absolutely uncontrolled; for it is clear, from these canons, that where the person who examined was to make inquiry, his decision was final, unless there was an appeal to the Pope. I suppose here my learned friend will not contend that there should be an appeal from the archbishop to the crown again, and that we are to proceed in a circle;—first the crown to appoint, then the archbishop to reject, and then the party to come to the crown again. That is directly without principle and without authority. And with these observations I will dismiss this part of the case.

Now there is another part of the case, upon which, as my learned friend, the *Attorney General*, has made some observations, I will cite to your lordships a few authorities. I will be very short, after the discussion having occupied so large a portion of time; not too great for the importance of the matter at issue, though it may be too great, looking to some of the questions which are here raised.

I submit to your lordships, upon another principle, that this rule must be discharged. Here is a matter before a court of competent jurisdiction. I am arguing upon the supposition that my learned friend, Sir *Fitzroy Kelly*, has established his first proposition. If my learned friend establishes, upon the true construction of the act of parliament, that the archbishop is bound to inquire, then we shall be in this position:—my learned friend will hardly contend, that every person who comes forward, whoever he may be, whatever the nature of his objection, whatever may be his character, whatever his conduct, in whatever light he presents himself,—has a right to be heard. There must be, I apprehend, what there is in all other suits (if this be a suit), a discretion to decide whether the particular party shall be heard or not; and the decision, however erroneous, being a matter within the jurisdiction of the court, and the court having decided it, your lordships cannot interfere, upon any principle which regulates the discretion of the court in these cases.

I shall however submit to your lordships another ground, upon which you cannot interfere. It is an established principle of this court, that you will not grant a mandamus to the ecclesiastical courts, where the ground of interfering is, that they have mistaken the ecclesiastical law. That, my lords, is an established proposition. As, unquestionably, before the right of these parties to be heard can be ascertained, a most important question of the canon law must be decided, it is impossible that your lordships can interfere; because you cannot assume an original jurisdiction, upon a question of ecclesiastical law. I will shortly cite the cases which have been decided upon a mandamus lying to the ecclesiastical courts. The first is a case from Lord *Raymond*, the case of *The Bishop of St. David's v. Lucy*. It was an application for a prohibition first, and afterwards for a mandamus. It is reported in 1 Lord *Raymond*, p. 539. I need not go through the facts to your lordships. Your lordships are aware that the prohibition was to prevent the delegates

from proceeding to deprivation; and the question was, whether the archbishop had the power to deprive the bishop. I will not trouble your lordships upon that point. It was decided that he had; but I will read the judgment of Holt, chief justice, (the judgment is in p. 543), because he lays down an important principle, as I think, for your lordships' consideration in this case. "Holt, chief justice, said, that though he was fully satisfied in his opinion that the archbishop had such jurisdiction, yet he would not make that the ground of denying a prohibition in this case. The matter of the suggestion is, that the archbishop is restrained by the canon law from proceeding, &c. without assistance, &c. Now it must be, that the court take notice that the archbishop by the common law hath metropolitical jurisdiction, and for that purpose he was constituted; that there are two in England, who are primates of their respective provinces; and then they have sufficient jurisdiction, and being the judges, though perhaps by the canon law they ought to take other persons to their assistance, yet their proceeding without such assistance cannot be a ground for a prohibition. If in fact the archbishop extended his jurisdiction further than he could by the rules of the common law, that might be a ground for a prohibition; but where all the authority that he makes use of is no more than what the common law allows him, but there are some ecclesiastical canons which restrain him from exercising the jurisdiction which he hath by the common law, that is matter proper for the conusance of the delegates upon the appeal, but no ground to prohibit them from proceeding. And it is without precedent, to grant a prohibition to the ecclesiastical court, because they proceed there contrary to the canons." That is the passage to which I wish to call your lordships' attention. "It is without precedent to grant a prohibition to the ecclesiastical court, because they proceed there contrary to the canons." I say, that it is equally without precedent, and without principle, to grant a mandamus to them, to hear something which they say they have decided that they cannot hear, being a question of canon law. It is indeed to grant a mandamus to them, because they have decided a matter of canon law erroneously. It is impossible to make a distinction between the two cases.—And then, "Gould, justice, said,"—showing the light in which he considered it as a judgment of the court which had exclusive jurisdiction,— "Gould, justice, said, that if a tortious judgment be given, that is proper matter for appeal, and not for prohibition." And then, my lords, we come to an application for a mandamus (which followed upon the prohibition being refused), and it is reported at the bottom of p. 544. I will read to your lordships what I find Lord Holt says there. "Then Mr. Montague, on behalf of the bishop, moved the court, that they would grant a mandamus to the commissioners delegates, to admit the bishop's allegations." Now, my lords, undoubtedly that was not precisely this case, but it was very near it indeed. The present application is to admit certain persons to be heard, whom the ecclesiastical court has decided, after argument, to have no right by law to be heard. That is what it has decided. The case now cited was to admit certain allegations, that is, certain evidence, which the delegates had decided that, by the canon law,

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compel the
granting of
probate.
Rex v. Raines.

they could not admit. Now, what does the court say?—(There is no distinction between the cases, after all, my lords. There is no doubt, as my learned friend reminds me, that the present application is to admit people to come in for the purpose of giving evidence: therefore it is as nearly the same point as possible; both being questions undoubtedly to be decided by the canon law, and which the ecclesiastical court must have jurisdiction to decide.)—Now, Holt, chief justice, says: "The king's bench cannot grant a mandamus to them, to compel them to proceed according to their law." That is precisely the present case. Is not this a mandamus to these parties, to proceed in a particular way, according to their law? How can the court do that? Then he says: "Indeed, mandamuses are grantable to compel probates of wills, because it concerns temporal right;" (I will call your lordships' attention to the cases upon that very shortly,) "and to compel the grant of letters of administration, because the statute directs to whom they shall be granted," (and because neither of them involve a question exclusively of canon law). "But in the present case a mandamus was denied." That is put as reported by Mr. Jacob, who, I suppose, was the master in court. Now Lord Holt refers to cases relating to the granting of probate; and the law with respect to that is undoubted. I think that it will not be necessary for me to cite the reports at length; but the cases are these. The first is *The King v. Sir Richard Raines*: it is reported in 1 *Salkeld*, in 1 Lord *Raymond*, p. 361, and in several other contemporary reports (*g*). The point there decided was, that this court will grant a mandamus to the ordinary to grant probate of a will, the will not being contested. That, my lords, is a feature which distinguishes the case from all others. There was no *lis pendens* there in the ecclesiastical court at all; the will was not contested; but the probate was refused upon the ground that the executor mentioned in the will was a bankrupt, and was refused, or was unable to find security for properly executing the will. The court of king's bench laid down there, that they must interfere, because without probate the party could not sue, nor administer the affairs of the deceased; and that, therefore, at common law, they were bound to put the ecclesiastical court in motion, and force it to entertain the case; because there it had refused to entertain the question of the will at all, until the person gave security. A mandamus went, my lords; and then, it appears, the issue of it was that the ecclesiastical judge applied to a court of equity for an injunction, which was granted, and that the party ultimately was obliged to find security. All that was decided there was, that where there is no contest upon a purely ecclesiastical matter (namely, the validity of the will), we will not allow you to decline jurisdiction, and refuse probate of the will, and prevent this party from obtaining his temporal rights. In the course pursued towards him, the ecclesiastical court was exacting from him a condition precedent to entering upon and taking jurisdiction of the case; which, by law, that court had no right to do.

Rex v. Hay.

My lords, that case was confirmed, but with a most important

(*g*) 1 *Salk.* 299; 3 *Salk.* 162; *Carth.* 457; *Holt*, 310; 12 *Mod.* 205.

qualification, in the case of *The King v. Dr. Hay*, which is reported in 4 *Burrow*, 2295. For there, my lords, a mandamus was ultimately refused. It was granted, in the first instance, to Dr. Hay, to admit the will to probate, and a certain person to be executor of the will. Dr. Hay returned, that there was a *lis pendens* in the ecclesiastical court respecting the validity of the will. And the court of king's bench said, that, in that case, they had no jurisdiction whatever; that it was a matter in the exclusive jurisdiction of the ecclesiastical court; and the rule for a mandamus was discharged, or rather the writ was quashed. And in that case, another case is referred to, in which the same point was ruled,—*The King v. Dr. Bettesworth*; which was cited from a note that one of the judges there had of it, but it does not appear to have been reported. The case itself illustrates, my lords, as it seems to me, the distinction most clearly, that where there is a suit pending, in the ecclesiastical court, concerning a matter in which such court has jurisdiction, this court will not interfere at all; but that where there is no suit pending, and where the simple question is, whether or not the court will put itself in motion and act, then this court will interfere.

Then, my lords, there are some cases respecting the application for a mandamus to compel the courts of civil law to appoint persons to offices. I will cite to your lordships two of them: they are very short. The first is a case also in Lord *Holt's* time: it is Mr. *Leigh's* case, which is reported in 3 *Modern*, p. 332. There Lord *Holt* lays down the same principle he had laid down in *The Bishop of St. David's* case (*h*). It was an application by Mr. *Leigh* for a mandamus to the ecclesiastical court, to restore him to the office of proctor. This court said, after argument, that that was a matter with which they could not possibly interfere: it was a matter of exclusive jurisdiction. At p. 335, Lord *Holt* says this: "They have an original jurisdiction over this matter; and a mandamus is in the nature of an appeal,"—(now, my lords, that seems to me a most important principle,)—"which will not be granted where they have such a jurisdiction; but when they exceed it, and encroach upon the common law, then prohibitions are granted. It is for this reason that in cases of divorce, which are of a higher nature than this case is, no appeal can be in the king's bench, for it would be an endless business for persons to appeal *ab uno ad aliud examen*." Therefore, my lords, there, in an application by a party, who had an unquestionable temporal interest to be appointed to something which the ecclesiastical court denied him, this court said, in the plainest terms, that it was a matter peculiarly within the ecclesiastical jurisdiction, that this court had no right to interfere, and that parties could not be dragged up *ab uno ad aliud examen*.

The next case, my lords, in which the same principle is laid down, is the case of *The King v. The Archbishop of Canterbury*, which was decided in this court, and is reported in 8 *East*, p. 213. It was an application for a mandamus to the archbishop of Canterbury, by a very learned person, Dr. Highmore, to admit him as an

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Mr. Waddington's argument.

Mandamus to civil law courts to compel appointment of officers. Leigh's case.

Rex v. Archbishop of Canterbury.

(*h*) *Supra*, p. 255.

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ton's argument.

advocate of the court of Arches. The application was refused, after consideration, by this court; and my Lord *Ellenborough*, in giving judgment there, does not put the refusal of the court precisely on the same ground as that on which my Lord *Holt* had put it; but he put it on this ground: he says, "There ought in all cases to be a specific legal right, as well as the want of a specific legal remedy, in order to found an application for a mandamus." That he states, twice over, as the ground. And, I apprehend, it will come to precisely the same thing. It means a legal right, which this court has the power of determining: it means, that the party must show to us that he has some legal right. It is the same principle as my Lord *Holt's*, only expressed in different language. He means this: a party, who calls upon us to interfere with the ecclesiastical court, must show us a right, which we can see to be a legal right: he must show that; and then he must also show that he has no specific legal remedy. Therefore, my lords, that is precisely in accordance with the other cases respecting the probate of a will,—the case where a mandamus was denied, and the case where it was granted. It was granted where the party showed, beyond all doubt, that he had a temporal right; because there was nothing shown against his right, and in favour of a power, which the law did not recognize, to impose certain conditions upon him. In the other case, of the proctor, and in the case too where the mandamus was refused as to the probate of a will, the party either showed no legal right, or, however clear a case he might have made out, in point of law, the mandamus was refused, because there was a *lis pendens* in the ecclesiastical court.

Mandamus to
magistrates.

Now, my lords, these are the cases which I find, as to applications for a mandamus to the ecclesiastical court. And I apprehend that they all, without exception, bear out the principle which I have ventured to lay down. There is a large class of cases, my lords, to which I will refer very shortly; they are so familiar to this court, from the many recent discussions upon them; I mean, the cases of mandamus to magistrates: and I apprehend that there also the proposition is precisely the same, and is quite in accordance with the case mentioned by my learned friend Sir *Fitzroy Kelly* (i), upon the authority of which he obtained this rule. My learned friend said, in the very able argument which he made in obtaining this rule, that, even if he was right in his construction of the act of parliament, it would be necessary for him to cite some authority to show that, in point of law, the court had the power to grant a mandamus. The case which he cited I think was *The King v. The Justices of Kent*, in 14 *East*. I forget the page, but it is a well known case; in which the justices declined the jurisdiction of a case brought before them. There was an act of parliament passed, it seems, which, in certain terms, enabled justices to regulate the wages of labourers. The justices had put upon that act of parliament an interpretation, that it was confined to agricultural labourers; and when other labourers—millers' servants, I think, they were—came before them, and said, We call upon you to make a rate for

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of Kent.

(i) *Supra*, p. 117. Rex v. The Justices of Kent, 14 *East*, 395.

the wages in our trade, the magistrates said, We shall not go into the case at all; we have no jurisdiction in it; it is not within the act of parliament. The parties came to this court for a mandamus; and the court granted it, in perfect conformity with all the principles laid down in all the cases,—namely, that the court will grant a mandamus, when a court of competent jurisdiction declines to entertain a case at all, in which this court can see that the inferior court has jurisdiction. Now that case is no authority whatever for the principle, either that this court will interfere, in the progress of a cause in the ecclesiastical court, because an erroneous decision is come to; or that it will interfere, in any respect, in any case, either ecclesiastical or civil, where the inferior court does not decline jurisdiction, but (as in this case) not only proceeds to decide the case, but actually makes a decree, as I shall contend, binding upon all parties. That, my lord, was the case of the magistrates, upon which my learned friend moved for this rule.

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I will very shortly direct your lordships' attention to some of the leading authorities upon this part of the matter. There is a late case upon the subject, which I think I ought to mention to your lordships, because it precisely bears out the other one, that is Mr. Carmichael Smyth's case,—*Ex parte Smyth*,—which is reported in 3 *Adolphus and Ellis*, p. 719. That, my lords, was an application for a mandamus, and also for a prohibition. The marginal note is, "Where a cause has been brought before the judicial committee of the privy council on appeal from the court of arches, and the judicial committee has decided in favour of the appeal, at the same time retaining the principal cause, and ordering the unsuccessful party to appear absolutely, subject to the approbation of the king in council, which approbation has been afterwards given, this court cannot, on a suggestion of error in the decision, issue a mandamus to the Privy Council to receive a petition for a rehearing of the appeal." Therefore, my lords, there was a refusal to receive a petition, which suggested that there was a wrong decision; and an application to this court to issue a mandamus to the judicial committee of the Privy Council to rehear the appeal, and to allow the petition to be heard, was refused. It is very difficult, my lords, I submit, to distinguish that case from the present, in a mode unfavourable to my argument. I can distinguish it from the present, favourably to my argument; because there, they refused altogether to hear the party: here they have heard him, and decided against him. Now, my lords, the language of the court is this:—Lord Chief Justice *Denman* says, "On the very statement in support of this motion, we have no power" (and your lordships will see how completely this agrees with all that has been said by my Lord *Holt*, and my Lord *Ellenborough*).—"A court of competent jurisdiction has decided in this case. If we were to interfere in the manner suggested, we might as well call upon the Lord Chancellor to revise any decision he makes, or upon any other court to reconsider its judgments. The rule cannot be granted. LITTLEDALE, J. When cases of this kind were referred to the Court of Delegates, a party dissatisfied with their judgment might have applied for a commission of review; but I have no

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notion that this court can now accomplish the object of such a commission by a mandamus. PATTESON, J. This court will undoubtedly take care that other courts shall do justice; but I never heard that we could compel any court to rehear a case already decided, which is, in effect, the object of this motion." That case, my lords, was also carried, but on the point of prohibition, to the court of exchequer; and it is reported in 2 *Crompton, Meeson, and Roscoe*, p. 748. There the judgments of the court were precisely to the same effect, that they could not interfere, by a prohibition, with the practice and proceedings of a court of competent jurisdiction; and it is distinctly laid down by Mr. Baron Parke, in his judgment there, that it was perfectly unimportant whether there was an appeal or no appeal: if there was an appeal, that was the proper remedy; if there was no appeal, even though the decision was wrong, this court could not interfere, because it was the decision of a court of competent jurisdiction.

In re Pratt.

Now, my lords, the cases against magistrates are so familiar to your lordships, that I will only cite one or two of them, which clearly establish this principle, which has been laid down and expressly recognized by this court, in reconsidering some other cases, where undoubtedly the court has interfered by mandamus somewhat improvidently, not exactly considering the difference between a preliminary objection made in the hearing of the cause and erroneously decided, and that which is the real point in the case, the declining of jurisdiction altogether. In the cases upon this subject, the strongest perhaps of all is, the case of *In re Pratt*, in 7 *Adolphus and Ellis*, p. 27. And, my lords, a stronger case than that, and one more resembling the present, it would be very difficult to find. "On appeal against a conviction for a trespass under stat. 1 & 2 Wm. 4, c. 32, s. 30, the appellant admitted the trespass, and offered only evidence that the property in the land was not as laid in the conviction. The sessions having rejected the evidence, and confirmed the conviction, without stating a case, this court refused to call upon them by mandamus to hear the case, since the mistake, if any, was one of law, which this court could not enter into, the appeal having in fact been heard, and no case sent up." Now, my lords, that certainly was a very strong case indeed; because the party offered evidence which was unquestionably admissible, as to whether he had trespassed upon the close of the party complaining; and the court positively refused to hear the evidence, or to allow the party to go into his defence at all. The language of this Court is extremely strong. I will not read the argument. "Lord DENMAN, C. J. The suggestion is, that the sessions were mistaken in point of law. If they had had any doubt, they would have sent a case; but they have not done so; and they have in fact heard the appeal." Here, my lords, the case is precisely the same, except that there it was not nearly so strong. In the present case, the matter has been heard, and has been decided; and there is no pretence for the power of sending any case to your lordships. Your lordships are not called upon to proceed *in invitum*, but to control and overthrow what has been done by these parties.

My lords, the same law is laid down in a variety of other cases; but the latest cases, and those in which it has been finally established and confirmed, are, the case of *Ex parte the Overseers of Tollerton*, in 3 *Queen's Bench Reports*, 792; the case of *The Queen v. The Justices of Buckinghamshire*, in the same volume, p. 800; and *The Queen v. The Justices of Kesteven*, in the same volume, p. 810. Those three cases establish, beyond all doubt, that the mere deciding upon the subject of a preliminary objection, however much it may be beside the merits of the case, is no ground whatever for this court interfering by mandamus for a new trial, to make the parties hear it again. That principle is completely established, and, I submit to your lordships, is applicable to, and must decide this question.

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Mr. Waddington's argument.

Ex parte the Overseers of Tollerton; Regina v. Justices of Buckinghamshire; Regina v. Justices of Kesteven.

My lords, I shall not occupy your lordships' time any further, having discussed the principal points in the case. Of course, my lords, I do not abandon the point which has been so ably argued by my learned friend, that these parties have not such an interest as the law will allow a party to rely upon, when he comes to call upon this court to control and review the decision of another court. They have no interest, it appears to me, in the slightest degree different from that of any other clergyman, nay, of any other inhabitant of the diocese, or of any other inhabitant of the country. And what your lordships must decide, if you decide at all in their favour, is this, that, in a proceeding of this description, every party, not one, but a thousand parties, have a legal right, such as this court recognizes, to come in and compel this court to force the judges, (the commissioners), by mandamus, to hear them; and to do that, when there is an actual judgment, an actual decree, perfectly final and conclusive, which is actually in existence; when there are no means of setting this judgment aside; where there is no *certiorari*, and no right to remove this decision, and to set it aside:—that, while there is an actually existing decision, these parties can come and say, we, and thousands of others, have such a legal interest in the matter, that we can call upon this court by mandamus to rehear it, and to let in not only us, but every other person,—each, I suppose, separately,—to prosecute his suit, and to call upon this gentleman, contrary to the universal practice of this court, contrary to the clear and obvious law, either by himself, or through the means of the dean and chapter, to defend his learning, his morals, his doctrines, his character, and his conduct.

Present opposers have no peculiar interest entitling them to the court's assistance.

The rule for a mandamus was supported by Sir *Fitzroy Kelly*, Dr. *Addams*, Mr. *A. J. Stephens*, Mr. *Peacock*, and Mr. *Badeley*.

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argument.

Summary of the
Attorney Ge-
neral's argu-
ment.

Whether the
act of confirma-
tion be ministe-
rial or judicial.

Dr. *Addams*. My lords, I have the honour to address your lordships in this case, in the absence of Sir *Fitzroy Kelly* (k). I very much fear, however, that I shall not be able to do it anything like justice; the more especially as, in the first place, I did not expect to speak, except in aid of Sir *Fitzroy Kelly's* argument; and in the second place, as I had not the slightest notion that I should be called upon to address your lordships to-day at all, because I parted with Sir *Fitzroy* at past ten o'clock last night, with the perfect understanding that he would be in court this morning. He is, however, unfortunately prevented from attending by illness; and under these circumstances, I must throw myself on your lordships' indulgence.

Now, my lords, in moving to discharge this rule, the *Attorney General* has contended, as I understand him, to this effect; first, that the act of the vicar general, or rather of the archbishop, in this case, was merely ministerial; secondly, that if it were judicial, the remedy is by appeal, and not by an application to this court for a mandamus; thirdly, that if the court (as we maintain it to be) in which this proceeding was originally depending, was really a court, it would still be to no purpose by mandamus to send the case to be reheard; because the court has no means of investigating the subject-matter of the charge. Fourthly, I understood him to say, that upon the showing of the affidavit, the matter proposed to be put in issue, (if it could be put in issue at all,) should have been proceeded with under the Church Discipline Act, and that the vicar general, or the court (whatever court it was in which the question of the confirmation of Dr. Hampden was depending) could, under the Church Discipline Act, have no possible right to enter into the investigation of the question which, as it is supposed, would have been submitted to them. And lastly, he has contended, and has been followed in that line of argument by the several other gentlemen who have addressed the court in discharge of the rule,—that this, at all events, is not a case for a mandamus.

Now, my lords, in respect of the act of the archbishop, or of the vicar general as representing the archbishop, being merely ministerial, that would depend, almost exclusively, upon the true construction of the statute of the 25th of Henry 8; because it was principally upon it that it was contended that the act of confirmation was merely a ministerial act in the archbishop, or in the officer whom the archbishop deputed upon this particular occasion. But in order to introduce what he contended to be the true construction of that act, the *Attorney General* very properly and very learnedly entered into a discussion of the general history of the appointment to bishopricks anterior to that act, and indeed from times of the earliest antiquity (l). Now, my lords, without following him into all those particulars, and without fatiguing your lordships with citations (and citations innumerable might be addressed to the court upon that subject), I will state to your lordships very briefly what I understand the case to be prior to the establishment of the canon law, after the establishment, and during the subsistence of the canon law, and thence downward, to the present time.

(k) Vide *supra*, p. 204.

(l) *Supra*, p. 124.

My lords, I apprehend that, by all the authorities, antecedent to the establishment of the canon law, the appointment to bishopricks was in the people and the clergy: they both had a voice in the election. In process of time, the people were excluded; and then the appointment of bishops was in the diocesan clergy. Afterwards the diocesan clergy were excluded, and it came to be an appointment, *sub modo* at least, by the clergy of the bishop's cathedral. But it must be admitted, that long before the statute of Henry 8 came into operation, the nomination was in effect in the crown; whether the *Congé d'élire* was or was not in use, still, to all intents and purposes, the nomination to bishopricks was in the crown. Mr. *Hill*, who addressed your lordships for the discharge of the rule, thought it worth his while to cite to your lordships two passages from *Blackstone's Commentaries* (*m*), for the purpose of establishing so self-evident a proposition, as that the appointment to bishopricks was in effect in the crown. My lords, no person can mean to deny that the appointment to bishopricks is in the crown. The *placing* of bishops is in the crown; but not the *making* of bishops, which is a totally different thing. And when it has been assumed, that this is an attack upon the prerogative, because we say that the appointment is not effectual without a confirmation, and that, in order to that confirmation, the metropolitan is not only justified in inquiring, but bound to inquire, into the qualifications of the person nominated, it seems to me, that we no more attack the prerogative of the crown, than it would be attacked, when, on the presentation of a clerk to a living by the crown, the bishop inquires into the fitness of that clerk. Now, my lords, without meaning to question the right of the crown to appoint to bishopricks, what we say is this, that at all times, and under all circumstances, whether the right of nomination was in the clergy and the people, whether it was in the diocesan clergy, the people being excluded, or whether it was in the clergy of the cathedral, excluding both the people and the diocesan clergy, yet still, at all times, and under all circumstances, the election, or nomination, or whatever it was to be called, was incomplete, until it was consummate by the confirmation: by the word *confirmation* being understood always the trial and the examination of the clerk who was nominated or elected, prior to the consecration. And I think I shall be able to satisfy your lordships, that at all times, and under all circumstances, (in this country at least), such trial and examination was, as it is now, conducted by a judicial proceeding in a competent court,—in which court contraditors were cited to appear, and might have appeared, and ought to have been heard if they did appear,—with a final sentence upon proofs; after which, and after which only, the archbishop, or metropolitan, was to proceed to consecrate.

My lords, that this was so under the canon law, and indeed anterior to the existence of the canon law, is proved even by the Novels of Justinian. My lords, the 123rd Novel of Justinian (*n*), which of course was long anterior to any of those documents which now constitute the canon law, is in these words. “ Si quis vero

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Brief history of episcopal elections.

The appointing of bishops is in the crown.

But not the making of bishops.

At all times, and under all circumstances, confirmation requisite.

Confirmation always included trial and examination, conducted judicially.

This was so anterior to the canon law.

Justinian's 123rd Novel.

(*m*) *Supra*, pp. 199, 200.

(*n*) Cap. ii.

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argument.

And under the
canon law.

Authority of
the canonists in
England.

Authority of
Lancelottus,
according to
Dr. Irving.

The doctrine of
the canon law,
relating to con-
firmation, as
explained by
Lancelottus,
applies to
bishops.

episcopum ad ordinationem electum ex quacunque causa accusaverit, quæ secundum leges vel canones electionem ejus impedire possit, differatur ejus ordinatio, et prius causam contra eum propositam (sive præsens sit accusator, et causam a se propositam persequatur, sive per tres menses accusationem suam peragere differat) is, a quo episcopus ordinandus est, diligenter examinet." The person by whom the bishop is to be consecrated is to inquire if there be any person who challenges this nomination. If there be any such, and he be absent, he is to have three months for the purpose of inquiring. So that, even to go back long anterior to the date of the existence of the canon law, there is at least some trace or vestige of a confirmation required, as appears by this Novel of Justinian.

My lords, this is a very obscure intimation. But when we come to consider the canon law, and the rules which were required by the canon law, we have no want of evidence upon the subject. And the books which have been cited to your lordships, (I mean such books as *Van Espen*, and *Ferraris*, and *Lancelottus*,) are quite good to show what the law was at that time. And then the only question which remains, as far as the present matter is concerned, is, whether, taking those books as evidence of what the rules of the canon law were, with regard to the election of bishops, they were or were not adopted, at the time of the Reformation, into the law of this country, and therefore are now to all intents and purposes the law of the land.

Now, my lords, a great variety of authors might of course be cited, and some have been; but, without citing any others, I would very briefly refer to an author, with respect to whose special title to be heard there can be no doubt whatever upon this occasion, after what has fallen from the learned civilian who addressed your lordships to-day. He has called your attention (*o*) to a passage from a book, which I suppose he considers as of some authority, *viz. Dr. Irving's* treatise on the Civil Law; by which it appears that the treatise of this very *Lancelottus* was *quasi* adopted into the *Corpus Juris Canonici*; and though he says that it was never authoritatively so adopted, yet still it is a book, as I contend, at all events of the very greatest weight, upon all questions of the canon law. Surely, if the treatise of this author was all but adopted into the *Corpus Juris Canonici* (it had the approbation, I think, of Paul 4) (*p*), it is at least a book of the greatest possible weight, for the purpose of showing what was then regularly understood and practised, as in accordance with the canon law, on the subject of the election of bishops; and it will save the necessity of going into any particular titles of the Decretals, or other portions of the canon law, for the purpose of showing what the canon law was. I do not refer to the book as authority, except for the specific purpose of showing the doctrine of the canon law upon the election of bishops. Now the ninth title of the first book is especially upon this head, "De Confirmatione Electionis;"—"Electionis" generally,—the confirmation of a canonical election; but we shall see particularly how it is applicable to the election not of a *prelate*, (for some distinction has

(*o*) *Supra*, p. 231.

(*p*) *Supra*, p. 182, n. (*u*).

been attempted to be drawn between a prelate and a bishop) (*q*), but of a *bishop* by name.

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Now, without going any further, the very title of this section is quite sufficient to exclude what was rather thrown out, than fully carried out in argument, by the learned *Attorney General*, when he seemed to say, that objections might be taken to the process of the election, but which, he says, you do not suggest that you were disposed to take, judging by your affidavit; but he doubts whether objections could be taken of the nature which it appears that we were prepared to urge, to the *persona electi*: for he intimated that there was considerable reason to suppose that the only question which could be gone into as to the *persona electi*, was the question of identity (*r*), (at least I so understand him; if not, I beg his pardon;—I am sure I do not wish to misrepresent him). Now the head of this title (title 9, *De Confirmatione Electionis*) is this (*s*):—"Ad confirmationem requiritur, ex parte confirmandi, confirmandi literæ; ex parte confirmantis, examinare electum, dignum confirmare, digniorem præferre." I am prepared to show that the whole of this was adopted into our law, at the time of the Reformation, and is therefore, to all intents and purposes, now the law of the land. And then, on the part of the "confirmator," which would here be the metropolitan—

Dr. Addams's argument.

And was adopted into the law of England.

The *Attorney General*. Will you have the kindness to tell me whether that is the beginning of it?

Dr. Addams. Yes; the beginning of it.

The *Attorney General*. That is the difficulty. We must get an accredited *Lancellotus*; for our copy does not agree with that; nor does Dr. Twiss's.

Dr. Addams. I was not aware that I was quoting from a different edition.

The *Attorney General*. We had better settle the point. There are three copies in court, two of which do not contain this passage.

Dr. Addams. It is only the heading. I was not, I am sure, aware that my copy differed from your's. This is merely the head of the title, which it appears is not inserted in the edition of the *Attorney General*. On the part of the "confirmans," it is required "examinare electum, dignum confirmare, digniorem præferre." When there was a double return, he was "præferre digniorem:" where there was no double return, he was "dignum confirmare:" but, in order *dignum confirmare*, he was to institute an inquiry for the purpose of showing whether the *confirmandus* was worthy, whether he was fit to be confirmed. Now, my lords, to remove all possibility of doubt—

(*q*) *Supra*, pp. 178, 180, 234.

(*r*) *Supra*, p. 153.

(*s*) This heading will be found in the edition of 1606, in the Library of Doctors' Commons, where it stands thus:—

"Ad confirmationem requiritur ex parte	{	Confirmandi	{	Consensus confirmandi.
				Confirmandi literæ.
	{	Confirmantis	{	Examinare electum,
				Dignum confirmare, Digniorem præferre."

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Canterbury.

Dr. Addams's
argument.

The *Attorney General*. I merely state that nothing of this is in either of these two copies. I have the copy of my learned friend, the edition of 1715.

Dr. *Addams*. I would not have brought it into the discussion, if I had been aware that there was any difference.

The *Solicitor General*. Mine is 1578.

Dr. *Addams*. Then I will proceed to those parts about which there can be no question.

Mr. Justice COLERIDGE. What is the date of your edition, Dr. *Addams*?

Dr. *Addams*. My lord, it is 1584.

Mr. Justice COLERIDGE. Then your's is later.

The *Solicitor General*. Mine is 1578, my lord.

The *Attorney General*. The book which I cited from, my lords, and which I believe is the best edition, is dated 1715.

Dr. *Addams*. This particular edition, it seems, has set out the contents of the title.

The *Solicitor General*. There are different glosses, and there are different headings.

Dr. *Addams*. Then I will refer neither to the glosses, nor to the heading of the title, but to the title itself. "Petet igitur is, qui confirmatus est, ab apostolica sede literas confirmationis (*t*)"—and so on. And then it proceeds a little lower: "Is autem ad quem confirmatio pertinet diligenter examinare debet et electionis processum, et personam electi. Est enim hoc generale, ut ad quem pertineat examinatio, ad quem manus impositio spectat."—Now this would belong to all orders, not merely to the order of bishop, but to the order of deacon, the order of priest, and those orders which were orders in the church of Rome, though not admitted in the church of England.—"Ad quem manus impositio spectat. Et cum omnia rite concurrunt, tunc munus ei confirmationis impendat. Quòd si secus factum fuerit, non solùm dejectendus erit indigne promotus, verum etiam indigne promovens puniendus. Nihil est enim quod ecclesiæ Dei magis officiat, quam si indigni ad regimen assumantur animarum." (*u*) And the gloss is, "Tenetur enim examinare personam electi maxime in scientia, honestate vitæ"—

The *Attorney General*. There is no such gloss in my copy (*v*).

Dr. *Addams*. Is there no gloss? because there is here.

The *Attorney General*. My learned friend, the *Solicitor General*, read the gloss upon that (*w*), which is quite another thing. My copy has no gloss at all upon the words.

Dr. *Addams*. Then I will not read the gloss, if we do not agree. I will confine myself to the text. I was really not aware that we differed. "Quod cum in cunctis sacris ordinibus sibi locum vindicet, in episcopo tamen multo fortius." Now, there is no *prelate* here—"in episcopo tamen multo fortius, qui ad curam aliorum positus in seipso debet ostendere, quomodo cæteros in domo Dei oporteat conservari." Therefore he lays down these rules for the confirmation of election generally; and lays down, that if this

(*t*) Lib. 1, tit. ix, s. 4.

(*u*) Id. s. 5.

(*v*) Vide *supra*, p. 183, n. (*y*).

(*w*) *Supra*, p. 183.

applies generally, it applies *a multo fortiori* in the case of a bishop. Now I think, without citing *Van Espen*, *Ferraris*, or any other number of authors upon the canon law, but merely considering the character which belongs to this book, (as I collect from the extract (*w*) which has been read to the court by the learned civilian to-day), that I cannot put the practice of the canon law upon a higher footing. And then comes the question, Was this canon law, as to the confirmation of election, particularly of bishops, adopted by this country at the time of the Reformation, and has it been acted upon uniformly ever since? Because, if so, unquestionably it now is the law of this country.

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My lords, the law upon this subject is so abundantly clear, that I would not trouble your lordships by citing any authority to prove it, if it could not be discussed in a very few words. Now, Mr. Justice *Blackstone*, in the introduction to his most valuable *Commentaries*, speaking of the canon law, states of what it consists; with this I do not trouble your lordships—The *Decretum Gratiani*, the *Decretalia Gregorii noni*, and so on.—Then he says that besides these pontifical collections, there are other constitutions which have been received into this country, particularly the legatine constitutions, and so on. And then he proceeds in this way:—"At the dawn of the Reformation, in the reign of King Henry 8, it was enacted in parliament that a review should be had of the canon law; and, till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land, or the king's prerogative, should still be used and executed. And, as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England (*x*). Now, my lords, what the canon law was upon the subject of the confirmation of bishops, I take to be conclusively proved by this single book; and I do not trouble your lordships with going any further. The question is, was the canon law in this respect adopted into the law of this country at the time of the Reformation? Why, my lords, I think it is impossible that there can be a question, upon the precedents; to one or two of which I shall briefly call your attention, and, I think, these will set the matter at rest.

Blackstone's
Commentaries.
Authority of
the canon law
in England.

History of con-
firmation
traced, from
the dawn of the
Reformation.

My lords, the confirmation and the consecration of Cranmer to the Archbishoprick of Canterbury has already been called to your lordships' attention (*y*). It was after that act of the reign of Henry 8, for restraining the payment of annates, and prior to the act of Henry 8, which gave the papal supremacy to the crown, the 25th of Henry 8, (the chapter in question,) and which regulated the law, or rather laid down the law, in regard to the election and confirmation of bishops. Cranmer was elected by *Congé d'élire*—there is no question about that. *Congé d'élire* had crept in at some anterior time; under which the election was nominally given to the dean and chapter, but in substance was in the crown. It was controlled by what was insisted upon by the Pope, namely, that by whomsoever

Confirmation
and consecra-
tion of
Cranmer.

Introduction of
Congé d'élire.

(*w*) From Irving's Treatise, *supra*,
p. 231.

(*x*) Vol. I., pp. 82, 83.

(*y*) *Supra*, pp. 130, 168.

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Mode of proce-
dure, after the
statute, in Hen-
ry's reign.

In the reign of
Edward 6.

In the reign of
Mary.

Confirmation
and consecra-
tion of Cardinal
Pole.

In the reign of
Elizabeth.

Archbishop
Parker.

the appointment or election was made, the party elected must resort to him for confirmation. The confirmation seems to have been reserved by the Pope to himself, and that usurpation seems to have been acceded to; and under this usurpation it was that those large sums of money were extorted from bishops elected or bishops appointed. In the case of Archbishop Cranmer, (as it should seem by what has been said by one of the counsel who addressed your lordships to-day,) there was paid no less than the sum of 900 golden ducats for those eleven bulls which he obtained from Rome, for the purpose of confirming his election.

Now, my lords, after this statute passed, I am not in possession of, nor am I able to cite to your lordships, any single particular instance of the way in which the election and confirmation of bishops proceeded, during the remainder of the reign of Henry 8. But, for a reason which I shall presently have to state, I think that not a doubt can exist, that, to all intents and purposes, they proceeded as they have done from the 1st of Elizabeth to the present time;—that the confirmation was, as under the canon law, by a judicial inquiry, in a court of competent jurisdiction, where parties were cited, where allegations were admitted, where witnesses were examined, and where there was a judicial sentence of confirmation, without which the metropolitan could not be called upon to consecrate.

My lords, during the reign of Edward 6, under a statute which I shall have to cite to your lordships in a subsequent stage of this inquiry, the question as to the confirmation of bishops appointed or elected does not seem to have arisen; or perhaps it did not arise. I cannot say positively that it did not arise, for I think that there must have been, (though I cannot find what it was, or how it was exercised,) some means which the metropolitan possessed of inquiry into the validity of the election or the appointment, and also into the person of the elected, before he could be required to consecrate. But from the commencement of the reign of Queen Mary, there are traces and vestiges of the same course having been adopted in the confirmation of bishops, that is adopted at the present time. For it appears that the confirmation and the consecration of Cardinal Pole proceeded, as far as one can collect, in the same form which, I say, must be presumed to have been adopted immediately after the passing of the statute of Henry 8, and which has continued to be used till the present day. It clearly appears that there was a *Congé d'élire* in the case of Cardinal Pole(z), and that he was confirmed in the very place where confirmations have regularly proceeded from that day to the present, viz., in Bow Church. But when we come to the reign of Elizabeth, there we have documents upon record, which remove all possibility of doubt or question upon the case. Because the first Protestant archbishop of Canterbury, (at least after Cranmer, if we call Cranmer the first Protestant archbishop,) was Parker; and documents exist with regard to the confirmation and consecration of archbishop Parker(a), which prove that all these forms of the canon law with respect to the election of

(z) Vide *supra*, pp. 43, 139.

(a) *Supra*, p. 56, n.

bishops were adopted at that time; and they have been continued and acted upon uniformly to the present day, or down to the confirmation, or the quasi confirmation which is now in question, of Dr. Hampden to the bishoprick of Hereford.

Now, my lords, it is well known that there was a circumstance, perfectly familiar to every one at all acquainted with ecclesiastical history, which caused the question of the confirmation and consecration of Archbishop Parker to be gone into with very great particularity; that is, the story—the well known story—(the fable, my learned friend says, the well known fable) of the Nag's Head consecration, which was set up some forty years afterwards, I believe, by Sanders; and caused all the circumstances attending the nomination or appointment, the election, and the subsequent confirmation and consecration of Parker, to be inquired into with very great minuteness. It is mentioned by *Burnet*; it is mentioned more fully by *Strype*; but the most particular and the most circumstantial account of it is that which is to be found in Bishop *Bramhall*, and which is published in the third volume of *Bramhall's* works in the *Library of Anglo-Catholic Theology*. Now this document is extremely remarkable; and it removes all question upon the subject. It is given verbatim, at great length; the whole process is there, and occupies a great many pages, (with which I am not going to trouble your lordships), but it is stated to be reprinted from the original Register; the contractions, stops, and orthography being retained with as much exactness as in so long a record and with ordinary types is attainable. It appears that the original is in the Registry of the court of the vicar general, and also at Lambeth; and this document really excludes the possibility of any question as to whether these rules of the canon law, with respect to the confirmation of the election of bishops, were not adopted into the law of the country, and have not been a part of it from that day to the present. Now, my lords, I am not going to trouble your lordships with reading this very long document, I would merely say that the whole is set out: and here it appears that the process which is now adopted is precisely similar to the process which was adopted upon the confirmation and the consecration of Parker: with one very singular exception; which however makes very much for the case which I am stating to your lordships; and that is this. The libel, or summary petition, (which is the same thing in point of fact,) was given in, on that occasion, to the court (for to all intents and purposes it was the court) of the confirming bishops, precisely according in substance with the allegation, the libel, or summary petition, which was given in, in this identical case. But in this case of the Lord Bishop elect of Hereford, and in modern cases, there have been no witnesses sworn and examined. The proof of the libel or summary petition has merely been the exhibition of the process; and no person appearing to object, no parties who were called upon to object—(they were promised that they should be heard if they did appear, in the case of Archbishop Parker, precisely as in the case of Bishop Hampden)—no person, I say, appearing, it has latterly been considered that there was no necessity to swear and examine witnesses on the libel or summary petition. But, my lords, in the instance of Archbishop Parker,

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Story of the Nag's Head consecration.

Bramhall's account.

Parker's Register.

The process the same as in the present case, with one important exception.

In Parker's case, witnesses

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were sworn and
examined, in
proof of the
articles of the
summary
petition.

though the formal parts of the summary petition or libel were considered to be proved by the exhibition of the process, that material article of the libel which pleaded the fitness of the archbishop in point of age, in point of learning, in point of piety, and so forth, was proved by witnesses sworn and examined, although the proclamation for the opposers to come in was not answered by any one coming in and claiming to be heard as an objector. Now, my lords, in that case, two witnesses were sworn and examined. The first was a witness of the name of Baker. He proved the first, second, third, fourth, fifth, sixth, and seventh articles of the summary petition, by exhibiting the process; but upon the eighth article of the allegation, we have his deposition, as taken down in writing and I will read it to your lordships, for it is not long. "Ad octavum; dicit in vim juramenti"—now it appears that this court cannot administer an oath, and cannot have a witness!—"in vim juramenti sui deponit quòd idem Reverendissimus Matthæus Parker fuit et est vir providus, ac sacrarum literarum scientia, vita, et moribus commendatus, ac homo liber et ex legitimo matrimonio procreatus, atque in ætate legitima, et in ordine sacerdotali constitutus, et dictæ Dominae nostræ Reginae fidelis subditus; reddendo causam scientiæ suæ in hac parte dicit,"—giving reason for his knowledge—"quòd est frater naturalis dicti Domini Electi; suntque ex unis parentibus procreati et geniti." He was half brother, the son of the same mother, but not of the same father; therefore he gave his deposition upon this eighth article of the libel, stating that he was able to give this account of him, being his half brother.

My lords, another witness (there were two witnesses examined in support of this allegation), was a person of the name of Tolwyn, who was a Master of Arts, and the rector of one of the churches in the City of London, of the age of seventy years. He deposes in the same way upon the first, second, and other articles; and he says, on the eighth, "Ad octavum; dicit et deponit contenta in hujusmodi articulo esse vera, de ejus certa scientia, quia dicit quòd bene eum novit per hos xxx annos, ac per idem tempus secum admodum familiaris fuit, et in præsentem est; et etiam dicit quòd novit ejus matrem." (I do not know what his mother had to do with it). Therefore, at that time, there was this libel, not only given in, but examined too: not only was it proved by the exhibition of the process, but to that material article witnesses were sworn and examined, and gave their depositions; although parties had been cited there, as now, to come in, and no parties appeared for the purpose of objecting.

Mr. Justice ERLE. What is the date of that, with reference to the statute?

The *Attorney General*. 1559, my lord.

Mr. Justice ERLE. With reference to the statute of the 1st of Elizabeth, is the date of the month given?

The *Attorney General*. Your lordships will find this explained in *Strype*.

Dr. Addams. It was on the 9th of December, 1559. It was in the 1st of Elizabeth, almost immediately after her coming to the throne.

Mr. Justice ERLE. My question was directed to whether it took

place before the passing of the act of parliament which revived the statute of the 25 Hen. 8 (b).

The *Attorney General*. Your lordship will find that is stated to be after the statute, but not according to the statute. So says *Strype*.

Dr. *Addams*. A great deal has been said which I shall have an opportunity of noticing presently. But as it has been urged, that if this mandamus was granted, and if the court (for so it is,) of the vicar general was to enter into this inquiry, it is utterly impossible that it could be completed within the twenty days from the time of the election, perhaps it is not quite immaterial to remark that this confirmation and consecration of Archbishop Parker did not take place within the twenty days after his election, not till after those twenty days had expired.

Now, my lords, without at all meaning to question that the appointment to bishopricks is essentially in the crown, partly in right of sovereignty, and partly in right of patronage, or that it is in the crown, no matter why, still I do state that, by the canon law adopted into the law of this country, such appointment or election was of no force or validity until it was consummate by the confirmation. And I again say, that by the confirmation I understand the trial and the examination of the clerk who was nominated or elected, without which the metropolitan could not be called upon to consecrate. And we shall see whether any alteration was meant to be effected, or was effected in the canon law by this statute of Hen. 8. Surely the contemporary exposition of the statute did not conceive that to be so, because the confirmation of the election proceeded precisely as it did before. And though I have no means of stating what was the particular mode in which the metropolitan could inquire into the life and the character of the bishop elected, during the reign of Edw. 6, or though we may suppose there was no such process used during that short reign, and those troublesome times, yet I think it will by no means necessarily follow that there was not some process of that sort provided; though the statute does not expressly enable one to say what that process was. But with regard to the new bishopricks of Hen. 8th's creation, which, it should seem, were in the immediate collation or gift of the crown, (some reasons or other have been suggested (c), but perhaps I could suggest other reasons which would be more satisfactory to your lordships,) it certainly is remarkable, that after a very short period, after perhaps one or two appointments to those bishopricks, that form of collation, or gift, or donation, was abandoned; and even in the case of those new bishopricks, the form of the *Congé d'élire* was gone through:—there was an election, and there was a confirmation of that election, precisely as in the case of the ancient bishopricks. Now it has been said, that this might be out of a mere compliance with forms, or that it might be merely to put fees in the pockets of those persons who were entitled to fees upon these different proceedings. But, my lords, I think that there is a much graver, or at least a much more plausible reason, to be

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Parker's confirmation and consecration did not take place within twenty days after his election.

By the English canon law, the appointment of a bishop of no force till confirmed.

The term confirmation includes inquiry.

The statute of Henry 8 made no change in the canon law.

Some mode of inquiry during Edward 6th's reign.

In new bishopricks of king Henry's creation, elective form soon adopted, with confirmation.

Probable reason of this: the metropolitans required an opportunity of inquiry.

(b) Queen Mary died 17th Nov., 1558. Elizabeth's first parliament, (in which the act in question, c. 1, was passed,) met on the 25th Jan., 1559,

and was dissolved on the 8th of May in the same year, just seven months before Parker's confirmation.

(c) *Supra*, pp. 173, 199.

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Omission of
inquiry, in form
for consecration
of bishops.

As to priests
and deacons,
inquiry insti-
tuted both at
time of ordina-
tion and previ-
ously.

suggested; namely this: that the metropolitans of that day declined to proceed to consecration without having some means of inquiring and satisfying themselves as to the fitness of the persons to be consecrated. And it would really seem, my lords, that this was no more than reasonable; because if your lordships look into the forms of ordaining and consecrating bishops, priests, and deacons, you will see that with regard to the last two, *viz.* deacons and priests, there is that mode of examination and inquiry. But the form of consecration of bishops is totally silent upon that head: it supposes the fitness of the party to be ascertained in some different way:—the inquiry proceeds in the one case and does not proceed in the other. Nor would it be reasonable, indeed it would be directly contrary to the rules of the canon law,—to the rules of the canon law as adopted into the law of this country,—that the metropolitan should be required to consecrate upon the mere election of the dean and chapter, or upon the mere nomination of the crown, not only without any inquiry, but without the possibility of any inquiry into the fitness in any respect of the person to be consecrated.

Mr. Justice COLERIDGE. Are you speaking now of the present form of ordaining and consecrating?

Dr. Addams. The present, my lord.

Mr. Justice COLERIDGE. Is there any difference between the present, and that established in the time of Edw. 6?

Dr. Addams. No, my lord, none whatever. That form remains in force. Now in the ordaining of deacons, and the ordaining of priests, in both the one and the other, antecedent inquiry has been made, and inquiry is made at the time itself. Just in the same way as, in the marriage service, though the banns of matrimony have been already asked, yet still, at the time of the marriage itself, all parties are required to come forward and state objections, if they know of any, to the marriage about to be celebrated. So, in the forms both of ordaining deacons and of ordaining priests, all persons are called upon to come forward and state if they know of any objection to the person who is about to be ordained, notwithstanding that the bishop in those cases has instituted previous inquiries by means of his archdeacon; which archdeacon presents the persons for ordination. And the first question which is put to the archdeacon who presents them is, whether he has inquired into the learning, the morals, and the fitness of those persons, and whether he himself knows that they are fit persons to be ordained. Therefore there has been an inquiry made. And also, at the very time of the ordination itself, persons are invited to come forward and state if they can except to the persons about to be ordained. Thus it is in the form of ordering of deacons; and the same in the form of ordering of priests. In that respect there is no distinction between the one and the other. But in the form of consecrating bishops, there is nothing of the sort; there is no suggestion: the person who presents the bishop, presents him merely as "this godly and well learned man." No persons are called upon to come forward and state any objections to the person about to be consecrated; there is no sort of inquiry, no sort of trial, except certain questions which are put to the bishop about to be consecrated himself, and which are said to be put for the trial of his faith, &c. before the congregation there assembled.

The *Attorney General*. My lords, I have found all the dates about Archbishop Parker; which may be useful to your lordships. The *Congé d'élire* was on the 18th of July, in the 1st of Elizabeth. There was no letter missive in *Parker's* case. The election was on the 1st of August. On the 6th of December the day of confirmation was fixed to be holden on the 9th of December, on which day the confirmation took place, several months after the election. Then under his own hand he states, that he was consecrated on the 17th of December. These are all taken from *Strype* (*d*); and these are the dates of the instruments. There were more than twelve days between the *Congé d'élire* and the election, and more than twenty between the election and the confirmation.

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Dates of Parker's election, confirmation, &c.

Mr. Justice ERLE. What was the date of the act?

The *Attorney General*. The 1st of Elizabeth.

Mr. Justice ERLE. What day of the month?

The *Attorney General*. It is not mentioned, my lord.

Mr. Justice ERLE. Is there any provision for its coming into operation a certain time after it has passed?

The *Attorney General*. I am not able to inform your lordships upon that point (*e*).

Mr. Justice ERLE. That we can obtain otherwise.

The *Attorney General*. I believe, as a matter of history, that the parliament met in January. She began to reign in November; and, at that time, the year would end in March.

Dr. Addams. My lord, I have no doubt these dates are correctly set out from *Strype*, by the *Attorney General*; but I do not know that they involve anything very material.

The *Attorney General*. His lordship asked the question.

Dr. Addams. I do not know that anything material occurs upon what the *Attorney General* seems to insist upon, namely, that there was no letter missive in the case of Parker. However, if *Burnet* be correct (and *Burnet* is a correct writer), there certainly was a letter missive, because *Burnet* states it thus: After mentioning that Parker was with difficulty persuaded to accept the archbishoprick, he proceeds in this way: "But in the conclusion he submitted himself to her pleasure," (that is to the queen's pleasure). "In the end he was with great difficulty brought to accept of it. So on the 8th day of July the *Congé d'élire* was sent to Canterbury; and upon that, on the 22nd of July, a chapter was summoned to meet the 1st of August" (*f*).

The *Attorney General*. *Strype* says, that the queen sent the *Congé d'élire*—

Mr. Justice COLERIDGE. We have not yet heard what *Burnet* says.

The *Attorney General*. I beg your lordship's pardon.

Dr. Addams. "Where the dean and prebendaries meeting, they,

(*d*) Life of Parker, book 2, ch. 1.

(*e*) By ss. 7 and 10 of 1 Eliz. c. 1, the 25 Hen. 8, c. 20, was revived from and after the last day of the Session, which ended on the 8th of May, 1559,

more than two months before the date of the *Congé d'élire*.

(*f*) Burnet's Hist. Reform.; part 2, book 3 (vol. 3, p. 805; Oxf. ed. of 1829).

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Qu. whether
there was a
letter missive,
in Parker's
case.

Whether any
material altera-
tion of the
ancient prac-
tice was effect-
ed by the stat.
of Hen. 8.

Questionable
whether it is
absolutely im-
perative to
elect the per-
son named in
the letter mis-
sive.

Gibson.

according to a method often used in their elections, did by a compromise refer it to the dean to name whom he pleased: and he naming doctor Parker, according to the queen's letter, they all confirmed it." Therefore I presume there was a letter, at least according to the statement of *Burnet*; because he says, that the dean named Dr. Parker, according to the queen's letter.

The *Attorney General*. There seems to be a difference upon this point; because in *Strype* it runs thus: "To which petition and request the queen condescended; sending to them her letters patents (commonly called *Congé d'élire*) dated at Westminster, the 18th day of July, in the first year of her reign, granting them licence to go to election, without naming any person in the said letters, but only requiring them to elect such a person for their archbishop and pastor, *who should be devout to God, and useful and faithful both to her and to her realm*" (g).

Dr. *Addams*. The letter missive is separate, I know. The letter missive, I apprehend, was sent as usual in that case. I do not know that this is material.

Then, my lords, that being so, and, as I shall presently show, this confirmation and election (which, at all events, had uniformly subsisted, prior to the passing of the act, and continued after the act) not at all impeaching or being supposed to impeach, not the supremacy of the crown, as understood by the *Attorney* and *Solicitor General*, but the true supremacy of the crown, we shall presently see whether there was any alteration, or any material alteration, made in that respect by the statute of Hen. 8. Now the statute of Henry 8, required in words that which, no doubt, subsisted in fact before the statute itself had been passed; the practice being this, namely, that the election by the dean and chapter, though called a free election, (and to some extent it was a free election) yet, in point of fact, left the nomination, or the appointment, pretty much or altogether in the hands of the crown. It was so by the subsisting practice, if not by any positive law. But the statute of the 25 Hen. 8, made it, to a certain extent, a positive law; because it said, that the dean and chapter should obtain the *Congé d'élire*, and, upon that, "*shall elect*" (these are the words): the *Congé d'élire* shall be accompanied by a letter missive, and the dean and chapter *shall elect* the person named in the letter missive, and no other. It has been assumed that this is a positive command, a command which it was highly penal in them to disobey; and a force has been laid upon the word "*shall*" as if it were a matter which they were commanded to do upon their allegiance, subject to the penalties of *præmunire* if they did not comply. And I am aware that this is the interpretation put upon the statute by persons of not only great, but the greatest name; and with whom I venture to differ upon this point with very great hesitation and reluctance. Now even so great a man as Bishop Gibson has said, that upon this *Congé d'élire* and letter missive, the dean and chapter have no other choice but to elect the person named, or incur a *præmunire*. My lords, I have the greatest possible respect for Bishop Gibson, who was a very great and a very eminent

man: but I say of Bishop Gibson what the *Solicitor General* said of *Lyndwood*, that he was but a man; and the statute has never received any judicial exposition explicitly upon that point, namely, that if the dean and chapter were not to elect the person named in the letters missive, they would incur the penalties of a *præmunire*.

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Now, my lords, what is the form commonly acted upon with regard to the *Congé d'élire*, and with regard to this letter missive; and what was the form adopted on this particular occasion? Why, my lords, upon the face of the *Congé d'élire* and the letter missive in this case, I clearly am entitled to say, that if the crown had, under the act of parliament of the 25th of Henry 8th, the right to issue a positive command to the dean and chapter of Hereford to elect Dr. Hampden, and no one else, as their bishop, the crown did not exercise that right of command upon the present occasion; because the form of the *Congé d'élire* in the present case is as follows; and I believe it is similar to that which is usually adopted upon the like occasions. After stating that supplication had been made on the part of the dean and chapter, to the effect that they were destitute of the solace of a pastor, by the translation of their former bishop, Dr. Musgrave, to the see of York, and that they had petitioned for leave to elect another bishop, it proceeds: "We being favourably inclined to your prayers in this behalf, have thought fit, by virtue of these presents, to grant you such leave and licence,"—now what are the things which they are commanded to do upon their faith and allegiance, and upon the non-performance of which my learned friends want to read that they will incur a *præmunire*, which they would most undoubtedly incur, by the terms of the act of the 25th of Henry 8, if they do not proceed to election, within twelve days?—"requiring and commanding you, by the faith and allegiance by which you stand bound to us, that you elect such a person for your bishop and pastor, as may be devoted to God, and useful and faithful to us and our kingdom" (*h*). That is all they are commanded to do, upon their faith and allegiance; not to elect any particular person, but only "such a person for your bishop and pastor, as may be devoted to God, and useful and faithful to us and our kingdom."

Form of the
Congé d'élire.

Now what is the letter missive? Are they required to do anything here upon their faith and allegiance? No. "To our trusty and well beloved dean and chapter of Hereford, in the diocese of Hereford. Trusty and well beloved, we greet you well. Whereas the bishoprick of Hereford is at present void by the translation of the Right Reverend Father in God, Dr. Thomas Musgrave, late bishop thereof, we let you weet, that for certain considerations us at this present moving, we of our princely disposition and zeal being desirous to prefer unto the same see a person meet thereunto, and considering the virtue, learning, wisdom, gravity, and other good gifts, wherewith our trusty and well beloved Renn Dickson Hampden, D. D., is endued, we have been pleased to name and recommend him unto you, by these presents, to be elected and chosen into the said bishoprick of Hereford. Wherefore we require you, upon receipt

Form of the
letter missive.

(*h*) *Supra*, p. 3.

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Canterbury.

Dr. Addams's
argument.

The dean and
chapter may
still elect
whomsoever
they think
proper.

hereof, to proceed to your election, according to the laws and statutes of this our realm, and our *Congé d'élire* herewith sent unto you, and the same election so made to certify unto us, under your common seal." And the consequence of their not having chosen the party named in the *Congé d'élire*, by the statute of 25 Henry 8, (as I read, and as I understand it), is not the incurring the penalty of a *præmunire* or incurring any other penalty: the mere consequence is, that the crown, in that case, may nominate and appoint. But under this *Congé d'élire*, accompanied with the letter missive, and upon the true construction, as it appears to me, (though I state it with great deference to the court) of the statute of 25 Henry 8, would any one say, that if the dean and chapter of Hereford, instead of electing Dr. Hampden (the person named in the letter missive), had elected one of the gentlemen for whom I now appear, and who has been referred to in such complimentary terms by one of the counsel who addressed your lordships in the course of the day, that would not have been a good election; and that if the crown had accepted that election, and had by its letters patent desired the person so elected to be confirmed, that person would not have been, to all intents and purposes, Bishop of Hereford, though not named in the letter missive? It appears to me, my lords, I confess, that, beyond all question, he would. There is no positive command, except to proceed to an election, and to elect such a person "as may be devoted to God, and useful and faithful to us and our kingdom."

LORD DENMAN. Have we the letter to the dean and chapter upon the affidavit?

The *Attorney General*. The form is in *Gibson's Codex* (h), my lord. I do not object to my learned friend mentioning it. It is not upon the affidavit. My learned friend, the *Solicitor General*, referred to it (i) as being in *Gibson's Codex*.

Dr. Addams. My lords, it was used by the *Solicitor General* from *Gibson's Codex*.

The *Attorney General*. We cannot make any objection to my learned friend referring to it, though it is not upon the affidavit.

LORD DENMAN. Considering that to be the ordinary form.

The *Attorney General*. Yes; it is in the ordinary form in fact, only altering the name. It is in *Gibson's Codex*.

LORD DENMAN. Because the affidavit has only stated that the dean and chapter have howsoever elected the lord bishop elect.

Dr. Addams. My lord, that is all.

The *Attorney General*. These forms are set out in *Gibson's Codex*, except the alteration of the name.

The *Solicitor General*. We had better have them compared; we have not compared them. We had better see how that is; because perhaps it is too much to say, that they are the same as in *Gibson's Codex*: but I used them, thinking they were the same.

LORD DENMAN. You used them, supposing them to be the forms observed in all cases.

The *Solicitor General*. Yes, my lord.

(h) Vol. 2, p. 1327.

(i) *Supra*, p. 176.

The *Attorney General*. It certainly occurred to me that they were the same.

Lord DENMAN. But we cannot proceed upon anything, that may possibly vary from the statute in any respect. In this particular case, we must suppose that what has been done, has been done according to the statute. *Gibson's Codex* may be a description of that which the statute requires, but a more general one.

Dr. Addams. Now, my lords, in order to show how, in all probability, the form of the letter missive occurred, and to show to a certain extent what the practice in the appointment of bishops was, anterior to this act, I cite to your lordships a passage from Charles Leslie's *Case of the Regale*, London, 1701, p. 106. I will tell your lordships presently the book (*k*) from which I cite, but it is stated correctly from the book itself. He says this: "The instances which Mr. Prynne has collected of Bishops chosen by the clergy without the King were in the Popish times. And he tells us likewise that the Kings took this ill, and sometimes proceeded to punish these Bishops by seizing their temporalities, and making them compound, &c. There is another record I have met with; that is, an inscription now to be seen in the parlour of the hospital at Ledbury, in Herefordshire (which for the satisfaction of the reader I have hereunto annexed) wherein is told that Hugh Foliot, Bishop of Hereford, the founder of that hospital, was elected by the Presbytery of the Cathedral Church of Hereford in October A. D. 1219, without letters from the king, written to the prejudice of the free election, (even as it is testified of Robert Foliot to have been chosen before him in the year of our Lord 1173). He lived Bishop in the reign of King Henry the Third, &c. Mr. Prynne in his Records, vol. 2, p. 355, shows that the same Hugh Foliot was Archdeacon of Shrewsbury, and then recommended by King John to the Bishoprick of St. David's, which it seems was rejected, for his name stands not in the list of the Bishops of St. David's, but is amongst the Bishops of Hereford; so that he was refused by the Clergy of St. David's, to whom he had the King's recommendation, and chosen by those of Hereford without it, which, as before shown, they thought a prejudice to their free election." That will show that the letter missive came in by degrees; that sometimes bishops were chosen,—or at least in this instance the dean and chapter rejected a bishop who was recommended by the crown; and afterwards this same person was elected a bishop by a dean and chapter, to whom he was not recommended by the crown. And then *Leslie* adds this: "It was here taken notice of that the form of the *Congé d'esliers* in those days (as in the records produced by *Prynne*) was not by way of command to the Clergy, as now," (though now it seems only to be a recommendation), "but of request and desire only. The King called it his petition to the Clergy, and besought them to lend a favourable and benign ear to it. *Ut huic petitioni meæ favorem præbeant benignum*, was the form then in use, and shows plainly where the right of election lay. And likewise the force of præscriptions, which in time grow up to create a

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Dr. Addams's argument.

Practice in the appointment of bishops, anterior to the stat. of Hen. 8.

C. Leslie's Case of the Regale

Origin of the Congé d'élire.

(*k*) The Royalty of the Crown in Episcopal Promotions; according to the judgment of Divines, Canonists, and others, of the Church of England. Second Edition. London, Rivingtons, 1847, p. 36.

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Canterbury.

Dr. Addams's
argument.

No penalty of
præmunire in-
curred by
electing some
one else, in-
stead of the
person recom-
mended.

The supremacy
of the crown
contended for,
would, in effect,
make the sove-
reign a Pope.

The making, as
distinguished
from the plac-
ing, of bishops,
belongs exclu-
sively to spiri-
tual persons.

Authorities
relating to the
supremacy of
the crown.

right, and construe petition to mean command." That is how, I apprehend, the present form of *Congé d'élire* arose; and notwithstanding this statute of Henry 8, which might seem to make it imperative upon the dean and chapter, under a penalty, to elect the party chosen by the crown, yet still so much of the form of free election was kept up, that the letter missive was only in the shape of a recommendation to them. And certainly, as I read the statute of the 25th of Henry 8, the penalty incurred for not choosing the person named in the letter missive, or choosing any other person, was not any penalty of a *præmunire* incurred by the party, but it was only this, as I apprehend, that if the crown accepted the party chosen, whether named in the letter missive or not, and confirmed the election, such would be good: but otherwise the crown might nominate and appoint to the bishoprick.

Now, my lords, the great argument which has been addressed to your lordships upon this part of the case, upon the true construction of the statute of Henry 8, has been this; that if, at these confirmations, parties are to be heard in objection to the confirmations; if the metropolitan, to whom the mandate for consecration is addressed, shall at all inquire either into the regularity of the process of the election, or into the fitness of the person elected; if he shall not immediately, and in the first instance, without any inquiry, and without the possibility of any inquiry, proceed to consecration, he is to incur the penalty of a *præmunire*; since, with reference to this, he is infringing upon the supremacy of the crown. Now, my lords, this is to suppose the supremacy of the crown to be something entirely and altogether distinct from what I have always understood it to be; because, if the supremacy of the crown in these matters is that which is contended for by my learned friends the *Attorney* and *Solicitor General*, why then the crown in point of fact represents (and so, as I understood, they have said and maintained), to all intents and purposes, the person formerly denominated the Pope. And the consequence will be, that the crown will not only have the "*placing*," but the "*making*" of bishops, which does not belong to any but spiritual persons. A bishop, so not merely "*placed*," but "*made*," will be made to all intents and purposes by the crown; and the consequence will be that, at this present time, her majesty Queen Victoria will be what the papists of Queen Elizabeth's time said she was, neither more nor less than a woman Pope. Now, my lords, the crown itself has constantly and the most devoted servants of the crown have constantly disclaimed any such interpretation of the crown's supremacy. And really it is a very material part of the case, in order to arrive at the true construction of the statute of Henry 8, that we should see in what the supremacy of the crown actually consists. And I think I shall satisfy your lordships upon that head, by a series of authorities collected to my hand, and which I will state to your lordships from a book, or a pamphlet, from which I cite them; first informing your lordships, that I do not state them from the pamphlet itself, because the pamphlet does not contain one syllable written by the editor of the pamphlet, but is merely a series of extracts from writers of the highest authority upon this point, which is a fundamental point, and which it is absolutely necessary to clear up and to make intelligible,

before we can understand at all, what is the true construction of the statute of Henry 8.

My lords, the work from which I am going to cite is a work which has been published lately, entitled "*The Royalty of the Crown in Episcopal Promotions; according to the Judgment of Divines, Canonists, and others, of the Church of England.*"

The Attorney General. By whom?

Dr. Addams. I do not know by whom. It contains a series of extracts, and nothing but extracts from divines, canonists, and others of the Church of England. The few authorities which I am going to cite are those of *Hooker*, *Andrewes*, and others, whose works I have not brought into court, because it was really a mere affectation to cite them from the originals; for they are correctly extracted, word for word, and letter for letter, in those cases in which I have compared them; and I believe that throughout the whole they are correct. This is the second edition, published last year only, in 1847.

My lords, the first extract I will trouble you with (I will not read a great many) is from *Hooker's Ecclesiastical Polity* (l), book 8, ch. 7, vol. 3, p. 524, of the Oxford edition of 1836, (Mr. *Keble's* edition).

Lord DENMAN. I understand Dr. Addams to say, that he has verified the correctness of all these extracts.

Dr. Addams. Several of them I have, my lord. I cannot say every one, but several; and I have no doubt that they are all correct. Now, my lords, *Hooker* says, "Touching the advancement of Prelates into their rooms by the king, whereas it seemeth in the eyes of many a thing very strange that Prelates, the officers of God's own sanctuary, than which nothing is more sacred, should be made by persons secular, there are"—[this is one explanation which is given of them]—"that will not have Kings be altogether of the laity, but to participate that sanctified power which God hath endued his Clergy with, and that in such respect they are anointed with oil." That is one suggestion, namely, that they are not altogether secular persons, but, in respect of their being anointed with oil, they partake something of a sacerdotal character. But he does not like that explanation; and the explanation which he gives is this. He says, "A shift vain and needless. For as much as, if we speak properly, we cannot say Kings do make, but that they do place, Bishops." [Nomination is one thing: the making depends upon the consecration; and that must be performed by a spiritual person; and that spiritual person must have the means of ascertaining the fitness of the person to be consecrated; and that fitness, in this country, has been commonly ascertained by means of a judicial proceeding, a trial and a sentence of a due and competent court.] "For in a Bishop there are these three things to be considered: the power whereby he is distinguished from other Pastors; the special portion of the Clergy and people over whom he is to exercise that bishoply power; and the place of his seat or throne, together with the profits, pre-eminences, honours thereunto belonging. The first every Bishop hath by consecration." Consecration must be preceded by confirmation. There is no instance of consecration,—there is no instance of giving any order,

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Canterbury.

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argument.

Hooker.

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argument.

Examination of
a bishop at his
consecration.

Difference in
the forms of
ordination, of a
priest or dea-
con, and of a
bishop.

and *à fortiori* the order of bishop, without the person who lays on hands having the means and the opportunity of considering the fitness of the person upon whom the hands are laid. And neither upon reason nor principle, and still less upon authority, is there any distinction between the crown and a private patron in that particular. And I again say, that I see no more how, in the slightest degree, it infringes on the prerogative of the crown, that the metropolitan, who is called upon to consecrate, should inquire into the fitness of the person to be consecrated, than I can understand how it is infringing the prerogative of the crown, when the crown presents to a living, that the bishop who is to institute to that living should say, "You must satisfy me that you are a fit person."

Lord DENMAN. The archbishop is required, before consecration, to *examine and try*; very strong words. There could be no words apparently more striking, and more ample and full than those words. But then the act of consecration includes not only the questions, but the answers. The question is put, "Are you persuaded" so and so? The answer is to be, "I am so persuaded."

Dr. Addams. Yes, my lord. I will now state to your lordships what the precise difference is in the forms. In the making of deacons, and the making of priests, the form is this. The archdeacon presents the deacons in the first instance, and says, "Reverend Father in God, I present unto you these persons present to be admitted deacons." Then this follows: the bishop says, "Take heed that the persons whom ye present unto us, be apt and meet, for their learning and godly conversation, to exercise their ministry duly, to the honour of God, and the edifying of his church." And then the archdeacon shall answer, "I have inquired of them, and also examined them, and think them so to be." Now, your lordships will recollect that there is a form called a *Si quis*, previous to persons presenting themselves for ordination; by which all persons who object are called upon to come forward and state their objections, if any objections there be. Then the bishop himself says to the congregation assembled, "Brethren, if there be any of you who knoweth any impediment, or notable crime, in any of these persons presented to be ordered deacons, for the which he ought not to be admitted to that office, let him come forth in the name of God, and show what the crime or impediment is." When no persons come forward, then the ordination proceeds. And this is exactly the same in the ordination of priests, *mutatis mutandis*.

Now, my lords, we come to the bishop. And here your lordships will see that there is nothing of the sort. The form of ordaining or consecrating of an archbishop or bishop is this. There is a collect; there is an epistle and gospel. (By the way, the epistle is from the 1st of St. Paul to Timothy (*m*), in which he is particularly charged to lay hands suddenly on no man (*n*)). Now it appears that the archbishop is to read this very collect, at the time when, according to the supposition on the other side, he is to lay hands suddenly upon a man, and to consecrate him a bishop, because he has no means whatever of inquiring into his fitness. As to inquiry, there

is nothing of the sort: the person presented for consecration is the nominee of the crown; and being such, the archbishop is, without any inquiry being made, to do that very thing which bishops are cautioned against doing; he is to lay hands suddenly upon a man, and not only to give him orders, but to give him the superior order of a bishop, or even of an archbishop!

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argument.

Now, my lords, the epistle and gospel being finished, "after the gospel and the Nicene creed and the sermon are ended, the elected bishop (vested with his rochet) shall be presented by two bishops unto the archbishop of that province, (or to some other bishop appointed by lawful commission,) the archbishop sitting in his chair near the holy table, and the bishops that present him saying, "Most Reverend Father in God, we present unto you this godly and well-learned man to be ordained and consecrated bishop." Then shall the archbishop demand the queen's mandate for the consecration, and cause it to be read. And the oath touching the acknowledgment of the queen's supremacy shall be ministered to the persons elected, as it is set down before in the form for the ordering of deacons. And then shall also be ministered unto them the oath of due obedience to the archbishop, as followeth." Then follows the oath of obedience. The archbishop is then to "move the congregation present to pray." Then follows the Litany; and then the archbishop shall say to him that is to be consecrated, "Brother, forasmuch as the holy Scripture and the ancient canons command, that we should not be hasty in laying on hands, and admitting any person to government in the Church of Christ, which he hath purchased with no less price than the effusion of his own blood; before I admit you to this administration, I will examine you in certain articles, to the end that the congregation present may have a trial, and bear witness, how you be minded to behave yourself in the Church of God." Then he puts certain questions to the bishop, and the bishop gives certain answers.

Lord DENMAN. In reply.

Dr. *Addams*. That is all. But there is no trial; there is no examination; there is no opportunity for persons to come in and object. For the satisfaction of the present congregation, he puts those questions; and to those questions the bishop returns answers: that is all.

Lord DENMAN. The form that is mentioned is in the early Prayer Book of the Church of England, as by law established, the Prayer Book of Edward 6, and the form, I believe, is unaltered now.

Dr. *Addams*. Exactly, my lord. Now, after that part which I read from *Hooker*, he puts this (o). "With consecration the king intermeddleth not further than only by his letters to present such an elect Bishop as shall be consecrated. Seeing therefore that none but Bishops do consecrate, it followeth that none but they only do give unto every Bishop his being." *Hooker* only says, consecration; but I submit that consecration implies a previous confirmation; because, without confirmation, (at all events with the exception of those

Hooker.
Consecration a
purely spiritual
act.

Consecration
implies a pre-
vious confirma-
tion.

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Canterbury.

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argument.

bishopricks that are supposed to be donatives, where the form of *Congé d'élire* was assumed almost immediately after their erection, in order, it may be fairly presumed, that there might be a confirmation, for the satisfaction of the metropolitan, the person about to lay on hands)—with this exception, I say, there is no instance of consecration without previous confirmation; that confirmation comprehending a judicial inquiry in a court, into which court parties are invited and called upon to appear and object; and in which, even when there is no objection, facts are to be pleaded and proved on the part of the person about to be confirmed; without proof of which facts, there would not be, and there could not be, what there is, a judicial sentence of confirmation.

Here, my lords, I state from an authority, and a high authority, what the supremacy is, and how entirely (and I am sure I say it without any wish to be disrespectful) it opposes the view of my learned friends. But the fact is, my lords, I must take the liberty of saying that I think there has been some mistake upon this point; and I will state to your lordships in what the supremacy of the crown really consists; and then your lordships will see whether that which we pray of you,—namely, the granting of a mandamus, in order that this matter may be put into a true course of inquiry,—at all affects the supremacy of the crown.

Bp. Andrews.
Tortura Torti.

Now, my lords, Bishop Andrews, in his famous work, *Tortura Torti*(p), expresses himself in this way. It is in the edition of 1609, p. 380. “Atque ut semel defungar totâ hac de Primatu Regio quæstione, semel ut constet Primatus apud nos quæ jura sint, quid illius nomine intelligendum veniat; atque ita cesset vestra dehinc, cesset aliorum calumnia de vestro, et à vobis conficto, non nostro, et a nobis agnito Primatu: paucis sic accipe sententiam nostram. Primò, sub primatus nomine Papatum novum Rex non invehit in Ecclesiam;”—the king does not pretend, in virtue of supremacy, to be a Pope;—“sic enim statuit, ut non Aaroni pontifici, ita nec Jeroboamo Regi jus ullum esse, conflatum à se vitulum populo proponendi ut adoret (id est) non vel fidei novos articulos, vel cultus divini novas formulas procudendi.” Then he says this(q): “Vestrum illud (quod ad primatum pontificium propriè pertinere dicitis) docendi munus, vel dubia legis explicandi, non assumit, non vel conciones habendi, vel rei sacræ præeundi, vel sacramenta celebrandi; non vel personas sacrandi, vel res;”—he does not assume any power of consecration, as the Pope did, who might command confirmation, or dispense with confirmation, as he pleased;—“non vel personas sacrandi, vel res; non vel clavium jus, vel censuræ. Verbo dicam; nihil ille sibi, nihil nos illi fas putamus attingere, quæ ad sacerdotale munus spectant, seu potestatem ordinis consequuntur. Omnino vestra hæc calumnia est, in odium conficta, et Regis, et nostrum: Regis, quòd ille sibi hæc arroget; nostrum, quòd nos illi ista tribuamus. Procul hæc habet Rex; procul à se abdicat.” Why, here he directly renounces that power which is now claimed for the crown, and deems it odious that it should be so claimed.

Next, my lords, I will give your lordships a citation on the same

(p) The Royalty of the Crown, p. 6.

(q) P. 7.

subject, in English, from an authority, and the very highest authority,—one of the greatest names to be found in the church of England, in connection with such matters;—and that is Bishop Stillingfleet. Now Bishop Stillingfleet, in a learned treatise of his, *on Ecclesiastical Jurisdiction*, (expressly therefore on the subject in question) vol. 2, pages 95 to 99, says this, which one would really think would obviate all doubt or cavil upon the subject (*r*). “To prevent mistakes and cavils about this matter, it will be necessary to clear the notion of supremacy, as it hath been owned and received in the Church of England. And for this we have two authentic declarations of it to rely upon. The first is mentioned, 5 Eliz. c. 1, s. 14, where the supremacy is declared to be taken and expounded in such form as is set forth in the admonition annexed to the Queen’s Injunctions, published in the first year of her reign. And the words there are, that the Queen neither doth nor will challenge any authority, but such as was of ancient time due to the imperial crown of this realm, that is, under God to have the sovereignty and rule over all manner of persons born within these her realms, dominions, and countries, of what estates, either ecclesiastical or temporal, soever they be, so as no other foreign power shall or ought to have any superiority over them.” (That is the supremacy which the queen has over all persons ecclesiastical as well as civil; and consequently they owe no allegiance to any other Sovereign.) “The second” of these declarations, he says, “is in the 37th Article” of the Church of England, “wherein it is declared, that by the supremacy is meant that only prerogative which we see to have been always given to all godly persons in Holy Scriptures by God himself, that is, that they should rule over all estates and degrees committed to their charge by God, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil doers.” And then, because it was with reference to this that he entered into the question of what was the true notion of the supremacy, he says, “So that granting a commission for proceeding by ecclesiastical censures is no part of that supremacy which our church owns; and thus the divines of our church have understood it. By the supremacy, saith Bishop Andrews, we do not attribute to the king the power of the keys, or ecclesiastical censures. R. Thompson, in his Defence against Becanus, saith, the supremacy is not to be defined by ecclesiastical jurisdiction, but by supream government.”

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Dr. Addams’s argument.

Bp. Stillingfleet, on *Ecclesiastical Jurisdiction*.

Francis Mason. *Vindicia Ecclesiæ Anglicanæ*.

Now I may cite to your lordships other authorities; but here is one which is precisely to the very point of the making and the institution of bishops; and that is a quotation from *Francis Mason’s* “*Vindiciæ Ecclesiæ Anglicanæ*; or *Vindication of the Church of England, and of the lawful Ministry thereof*, i. e., *of the Succession, Election, and Consecration of Bishops*.” (Therefore this is germane to the point.) “Translated into English, by *John Lyndsay*, London, 1734, book 3, chapter 7, p. 278 (*s*).” He states: “The objections of the Papists, that our Bishops are the Queen’s Bishops, and Par-

(*r*) The Royalty of the Crown, &c., p. 33.

(*s*) The Royalty of the Crown, &c., p. 15.

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Canterbury.

Dr. Addams's
argument.

liament Bishops, [are] answered, in general, by explaining our method of making Bishops." He gives a dialogue between a priest of the church of Rome, and a priest of the church of England. The priest of the church of Rome is called Philodoxus; and he says: "Your new pretended Bishops (as Scultingius saith) derive their counterfeit authority, not from lawful consecration, or catholic inauguration, but from the Queen and Parliament. They are therefore properly styled by Sanders, the Queen's Bishops, and Parliament Bishops. For (as Bristow relates) in England the King, yea and the Queen, grants letters patent to whom they will; and they thenceforth bear themselves for Bishops, and begin to ordain Ministers. Hence Bellarmine had reason to say, that in Queen Elizabeth's time there was a woman pope in England." Now *Orthodoxus*, who is a priest of the church of England, answers in this way, and explains and opens the whole subject.

The *Attorney General*. In what chapter?

Dr. *Addams*. It is in book 3, chapter 7, p. 278. The book is in court, and therefore it will be seen whether the quotation is correct. *Orthodoxus* replies: "These saucy shameless Papists proclaim aloud, that the Bishops of the Church of England derive not their orders from Bishops, but from Kings and Queens. A monstrous lye, and an impudent slander!"—(Now it seems that that is what the gentlemen insist upon.)—"For our Kings do that only which belongeth to the office of Kings, and our Bishops to that of Bishops. For 'at every avoidance of any Archbishoprick or Bishoprick, the King grants to the dean and chapter of that church a licence under the great seal of England (which is commonly called the *congé d'eslire*) to proceed to election, with a letter missive (as it is call'd) containing the name of the person which they shall elect and chuse. Then the electors do certify under their common seal (the election to be duly perform'd) to the King (humbly beseeching him to grant his royal assent thereto). The King (giving his assent to their election) signifieth the same to the Archbishop and Bishops, requiring and commanding them by his royal authority to confirm the said election"—(to confirm it with all the circumstances duly attending the confirmation of the election of the bishop; for which we must resort to the canon law, as adopted by the law of this country, and as collected from the instances since the Reformation)—"commanding them by his royal authority to confirm the said election, and to invest the said person so elected, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same." After this, the Archbishop and Bishops, following the example of their predecessors, take care, publicly and peremptorily, to cite all manner of persons, who have any thing to say or object, either against the form of the election, or the person elected, in general, or particular, personally to appear before them. And when it appears solemnly, and judicially, by publick acts, both that the election is valid, and the person elected of sufficient learning and probity, then at last follows the consecration; which is perform'd by a competent number of lawful Bishops, according to the direction of the ancient canons. This is the solemn and constant method of making bishops in England."

My lords, I have only to cite one more passage, because it is introductory to the case of Bishop Mountague.

The *Attorney General*. The title of this argument is, "This is an argument to repel the objections which are made against the Bishops created in the reign of Elizabeth."

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Dr. *Addams*. My learned friend so reads the heading. I said that the title of the chapter is as follows: "The Objections of the Papists, that our Bishops are the Queen's Bishops, and Parliament Bishops, answered, in general, by explaining our method of making Bishops." I believe that is pretty much to the same purpose.

Mr. Justice COLERIDGE. What is the original date of the book?

Dr. *Addams*. 1625, is the original date, my lord (s).

Lord DENMAN. Mason's Work is quoted by *Gibson*.

Dr. *Addams*. Yes, my lord, in several places.

The *Solicitor General*. And by *Strype*.

Lord DENMAN. There are very copious notes.

Dr. *Addams*. It is a very good authority.

The *Attorney General*. I am told that it was a work written for the purpose of destroying that story about the Nag's Head consecration.

Dr. *Addams*. Now, my lords, I have only one other citation. It is introductory to the case of Bishop Mountague. The extract is from Dr. *Richard Field on the Church*, London, 1610, Oxford, 1635, p. 680, book 5(t). *Field* says: "The onely question is, touching things naturally and meerely spiritual: the power in these is of two sorts: of Order and of Jurisdiction. The power of order is the authority to preach the word, minister the sacraments, and to ordaine Ministers to doe all these things; and this power the Princes of the world have not at all, much lesse the supream authority to doe these things, but it is proper to the Ministers of the Church."—They have no power to ordain ministers: *à fortiori*, they have no power to ordain bishops. And really if the crown can nominate to bishopricks, and can issue its mandate to the archbishop to consecrate, and if the archbishop must consecrate without inquiry, why then, to all intents and purposes, and beyond all question, the crown does in effect undertake to ordain ministers; and not only to ordain ministers, but to ordain the highest order of ministers, I mean bishops: and the result is, that the crown comes to exercise all those powers which were formerly exercised by the Pope: which is directly contrary to the true notion of supremacy, as explained by Bishop Andrewes, and by Dr. Field.—He goes on to say, "And if Princes meddle in this kinde, they are like to Uzziah, that offered to burne incense, for which he was stricken with leprosie. The power of jurisdiction standeth first in prescribing and making lawes: secondly, in hearing, examining, and judging of opinions touching matters of faith: and thirdly, in judging of things pertaining to ecclesiasticall order and ministry, and the due performance of God's divine worship and service. Touching the first, the making of a law is the prescribing of a thing under some paine or punishment, which hee that

Field on the
Church.

(s) The first edition was published in 1613.

(t) The Royalty of the Crown, &c., p. 12.

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prescribeth hath power to inflict. Whence it is consequent, that the Prince (having no power to excommunicate, put from the sacraments, and deliver to Satan) can of himselfe make no Canons, such as counsels of Bishops doe; who command or forbid things under paine of excommunication, and like spirituall censures; but (having power of life and death, of imprisonment, banishment, confiscation of goods, and the like) he may with the advice and direction of the Clergy, command things pertaining to God's worship and service under these paines, both for profession of faith, ministration of sacraments, and conversation fitting to Christians in generall, or men of ecclesiasticall order in particular; and by his princely power establish things formerly defined and decreed against whatsoever error, and contrary ill-custome, and observation." Now there follows this passage, to which I beg your lordships' attention. "And herein is so farre forth supreme, that no Prince"—(this is the notion of supremacy)—"that no Prince, Prelate, or Potentate, hath a commanding authority over him; yet doe we not, whatsoever our clamorous adversaries untruely report, to make us odious, make our Princes with their civill states, supreme in the power of commanding in matters concerning God, and his faith and religion, without seeking the direction of their Clergie, nor with them."—Now I beg your lordships to observe this;—not even with the direction of their clergy, "*nor with them*," so as to command what they thinke fit, without advising with others,"—(in certain matters, they must advise not only with their clergy, but with others)—"partakers of like precious faith with them, when a more generall meeting for farther deliberation may bee had, or the thing requireth it." Now, my lords, I say that this confirmation of bishops is a matter in which princes have not the right to proceed, without both the advice of their clergy and that of "others, partakers of like precious faith with them, when a more general meeting for further deliberation may be had, or the thing requireth it." And I take the liberty of saying, that both upon principle, and upon the authority of cases, the confirmation of bishops, nominated by kings, ensuing upon which is their consecration and their complete investment with the authority of bishops, is not a matter to be proceeded in, even with the advice of their clergy only: but there must be a participation of "others, partakers of like precious faith with them, when a more generall meeting for farther deliberation may be had, or the thing requireth it." The people have never so lost their voice even in the election of a bishop, that they have not a right to be heard, if they have any objection, a good objection, to the confirmation, and the consecration consequent upon it.

Lord DENMAN. We will proceed to-morrow morning, Dr. Addams. Will you be so good as to hand up that pamphlet?

Dr. Addams. If your lordship pleases.

(*The Pamphlet was handed up to their lordships.*)

Dr. Addams. My lords, in what I said to your lordships yesterday, I endeavoured to establish, and support by reference to various learned authorities, that the supremacy which had been claimed by the crown was the supremacy of jurisdiction, not a supremacy of order; that though the crown appointed the person, it did not make the bishop; and that if the crown could appoint the person, and compel the archbishop to consecrate, irrespective of all considerations of fitness, then the crown would make the bishop, and would claim the supremacy in a sense, and to an extent, which the crown never did claim, but, on the contrary, always disclaimed.

I also, my lords, submitted, that upon principle, and according to all practice, the confirmation of the election of a bishop was a judicial act; that it was so by the canon law, anterior to the Reformation; that it was a part of the canon law adopted at the Reformation; and consequently, that it is part now of the common law of this country.

My lords, this is implied to a certain extent by the word *confirmation*, as the Latin word "*confirmatio*" has a sort of forensic sense, and is used to signify the establishing something by proof. The election is to be of a person, godly, devout, and so on; but the confirmation of the election is the establishing of that by proof, as a sort of judicial act. And that has been the constant interpretation of the term "*confirmation*," both under the canon law, and under the common law. This would dispose, and finally dispose, of the first objection which was raised by the *Attorney General*, to the issuing of a mandamus; namely that the act in question, confirmation, was not a judicial, but a ministerial act; and that it was a ministerial act, in which the metropolitan had no choice but to confirm, under the provisions of the statute of Henry 8. Now the force of this objection would depend entirely upon the true construction of the statute of Henry 8; upon which it appears to me that the whole question turns; because I am perfectly free to admit, as far as my humble apprehension of the case goes, that if this act on the part of the archbishop was merely a ministerial act, he would incur the penalty of *premunire* if he did not complete and go on with it, according to the terms of the mandate. Then, beyond all possibility of doubt, that is a case in which no mandamus would lie, and your lordships would discharge the rule. But this depends entirely on the true construction of the statute of Henry 8, and is really, as it appears to me, the sole substantial objection to the issuing of the mandamus in this case. We apply for a mandamus, because we say we are barred of our right of appearing, and consequently precluded from what we claim to be entitled to, (the right, namely, to object to the confirmation), by reason of the ecclesiastical judge having misconstrued the act of parliament, and thus affording the fullest and fairest ground for the interference of this court in the assistance of justice, either by way of mandamus or prohibition, or both, as the case may require.

My lords, this act of the 25th of Henry 8, according to my humble opinion, appears to me to have been entirely mistaken. It had but one object, which was to defeat the claims, which had, up to that time, been made by the court of Rome, of interfering in the confirmation and election of bishops, and of securing in fact to the Pope the nomination of bishops; or, if the nomination of bishops was in

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the crown, of securing to the see of Rome the confirmation of those elections, if for no other purpose, at least for this purpose, to extort large sums of money, from those persons who had been elected, for bulls, briefs, and palls, &c., which were requisite before the consecration could duly and properly take place. And it was for repressing of those extortions, (this being at the commencement of the Reformation), that this statute was passed. Now I do not know that I have any right to refer to the title of the act : but it is, "an act for the non-payment of first fruits to the Bishop of Rome;" and the sections which are material are the 4th, 5th, 6th, and 7th ; which indeed relate especially to the manner of making and electing bishops and archbishops. Now the 4th section is this: that upon the vacancy of any bishoprick, the dean and chapter shall signify the same to the crown, and apply for its leave to elect a new bishop ; and upon that a *Congé d'élire* is accordingly issued, accompanied by a letter missive requiring the dean and chapter "with all speed and celerity," and "in due form," to "elect and choose the same person, named in the said letters missive, to the dignity and office of the archbishoprick or bishoprick so being void, and none other. And if they do defer or delay their election above twelve days next after such licence or letters missive to them delivered, that then for every such default,"—(it does not say they shall incur the penalties of *præmunire*)—"the King's highness, his heirs and successors, at their liberty and pleasure, shall nominate and present, by their letters patents under their great seal, such a person to the said office and dignity, so being void, as they shall think able and convenient for the same." And then : "That every such nomination and presentment to be made by the King's highness, his heirs and successors, if it be to the office and dignity of a bishop, shall be made to the archbishop and metropolitan of the province where the see of the same bishoprick is void, if the see of the said archbishoprick be then full and not void; and if it be void, then to be made to" another archbishop and so on. Now that goes entirely to nomination : for consecration and confirmation we must look to a further section (v). "And be it enacted, by the authority aforesaid, that whensoever any such presentment or nomination shall be made by the King's highness, his heirs or successors, by virtue and authority of this act, and according to the tenor of the same; that then every archbishop and bishop to whose hands any such presentment and nomination shall be directed, shall with all speed and celerity invest and consecrate the person nominated and presented by the King's highness, his heirs or successors, to the office and dignity that such person shall be so presented unto, and give and use to him pall, and all other benedictions, ceremonies, and things requisite for the same, without suing, procuring, or obtaining hereafter any bulls or other things at the see of Rome, for any such office or dignity in any behalf." Now the substance of this is: the archbishop shall proceed to consecrate with all speed and celerity, without suing out bulls or briefs from the court of Rome. Here we have no mention of the term of confirmation, nor can there be any in this part of the act, because confirmation is of election ; but it does

not follow necessarily, that because the metropolitan was commanded to consecrate, with all speed and celerity, the person named, therefore it was not competent to him, in some form and in some shape, to inquire into his fitness: nor can I conceive there would have been the slightest interference with the prerogative of the crown, any more than, if the crown were to present to a living, it would be an interference with the prerogative for the bishop to inquire into the fitness of the individual so presented, previous to his institution. The term "confirmation" is not used in this part of the section; nor could it be, because confirmation is of an election; there is no confirmation of a nomination and presentment; but it does not necessarily follow, I repeat,—(and I think I shall satisfy your lordships presently, that this is the true interpretation of the act)—it does not necessarily follow, that because a man is to consecrate, he is to consecrate irrespective of all considerations, and that he has no right to inquire in any form, shape, or way, into the fitness of the person about to be consecrated.

Now we come to what is to be done after an election; which is the material part. "And if the said dean and chapter, or prior and convent, after such licence and letters missive to them directed, within the said twelve days do elect and choose the said person mentioned in the said letters missive, according to the request of the King's highness, his heirs or successors, thereof to be made by the said letters missive in that behalf, then their election shall stand good and effectual to all intents." Now a great deal of argument has been founded upon this, "that the election is to be good to all intents;" and it has been asked, what can you make of this? what can become of this case, supposing the mandamus issues, and, upon that mandamus and what is done in consequence of that mandamus, it should appear that the metropolitan ought not and cannot proceed to the consecration of Dr. Hampden? what, it has been asked, is to become of it? There can be no fresh election, and no other nomination: it is to be good and effectual to all intents and purposes. That, as it appears to me, is not a reasonable interpretation of the act. The election is an inchoate act. It is clear from the case of *Evans and Ascuthe (w)*, and various other cases, that an election is merely an inchoate act, and unless consummate by confirmation, is not good and effectual to all intents and purposes. It has been represented, that if Dr. Hampden cannot be consecrated, he would still, under the election, remain the Lord elect of Hereford, and that there can be no new bishop (*x*). Now to take that proposition in another instance. Suppose, which is not a very unsupposable case, I will not say Dr. Hampden, but Dr. A., or Dr. B. were to be elected to a bishoprick, in the same way that Dr. Hampden has been elected to the Bishoprick of Hereford; and supposing, which is no very unsupposable thing either, that, between the time of election and consecration, the bishop elect were reconciled to the church of Rome; could it be said that the election was good to all intents and purposes, and that there could be no new election: and that, during the life of the party elected, the bishoprick must be without a bishop? Take another supposable case. Supposing that a person were elected under the

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Election, being but an inchoate act, is not good without confirmation.

Cases supposed: of bishop elect becoming a Romanist;

(*w*) *Supra*, pp. 51, 107, 146.

(*x*) *Supra*, pp. 156, 217, 253.

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letters missive, and between the time of election and consecration were to become insane, what is to become of the case then? Must the archbishop go on to consecrate? Must he consecrate a person brought into church by a keeper and in a strait-waistcoat? Would he incur the penalty of *præmunire*, if he did not? Would the person so elected remain Lord Bishop elect of the Bishoprick? Now it appears to me, without putting an irrational interpretation on the act of parliament, that the election is to be good and effectual to all intents and purposes, if consummate by the confirmation; and, the consecration ensuing, the party becomes a complete bishop.

Then, my lords, the act proceeds in this way. "And that the person so elected, after certification made of the same election, under the common and covent seal of the electors, to the king's highness, his heirs or successors, shall be reputed and taken by the name of the lord elected of the said dignity and office that he shall be elected unto; and then making such oath and fealty only to the king's majesty, his heirs and successors, as shall be appointed for the same, the king's highness, by his letters patents under his great seal, shall signify the said election, if it be to the dignity of a bishop, to the archbishop and metropolitan of the province where the see of the said bishoprick was void," and so on. That is, on taking the oath of fealty to the crown, and not one oath of fealty to the crown and one to the Pope, (which oaths had been said to be and were irreconcilable); not taking the double oath, but taking only such oath of fealty "as shall be appointed for the same, the king's highness, by his letters patents under his great seal, shall signify the said election, if it be to the dignity of a bishop, to the archbishop and metropolitan of the province where the see of the said bishoprick was void, if the see of the said archbishop be full and not void: and if it be void, then to any other archbishop within this realm, or in any other the king's dominions; requiring and commanding such archbishop, to whom any such signification shall be made, to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same,"—(now follows the material part)—"without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome for the same in any behalf." My lords, the archbishop therefore is required to confirm and to consecrate. The confirmation is just as much a judicial act, as consecration is a spiritual act; and when the archbishop is required to confirm, he is required to do the judicial act of confirmation; and, in the course of that judicial act or confirmation, he is to proceed *rite et solemniter*, according to the mode in use before the Reformation, and in practice ever since the Reformation. And he is not to proceed to confirmation irrespective of all considerations: for which argument there is not the slightest pretence. That would be an assertion of the supremacy of the crown, in a sense, and to an extent, to which the crown has never before challenged it. He is to confirm; and after that, the person elected is entitled to consecration.

Now, my lords, follows the sixth section; and upon this it is contended that the act is ministerial; though I think I have satisfied

your lordships, and could refer to authorities, if necessary, to show, that the act is not a ministerial, but a judicial act. The question is, whether this is a ministerial act by act of parliament, a ministerial act which the metropolitan is bound to perform irrespective of all considerations as to the fitness of the individual. And this appears to me to be the whole case on the other side, as well as I can understand it; because if the interpretation which I venture to contend for is the correct interpretation, I cannot conceive for a moment but that your lordships will be of opinion that this is a case in which the rule for a mandamus must be made absolute. Now it is enacted by the 7th section of the act, "And be it further enacted by the authority aforesaid, that if the prior and convent of any monastery,"—(this was before the dissolution of monasteries, and when some abbots and convents had the election of bishops)—"or dean and chapter of any cathedral church, where the see of any archbishop or bishop is within any the king's dominions, after such licence as is afore rehearsed shall be delivered to them, proceed not to election, and signify the same according to the tenor of this act, within the space of twenty days next after such licence shall come to their hands; or else, if any archbishop or bishop within any the king's dominions, after any such election, nomination, or presentation shall be signified unto them by the king's letters patents, shall" (not simply not confirm, but) "refuse and do not confirm" (that is, peremptorily and wilfully refuse) "and do not confirm, invest, and consecrate, with all due circumstance as is aforesaid, every such person as shall be so elected, nominate, or presented, and to them signified as is above mentioned, within twenty days next after the king's letters patents of such signification or presentation shall come to their hands; or else, if any of them, or any other person or persons, admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever,"—(clearly *ejusdem generis*) "or quality soever it be, to the contrary, or let" (not of execution, but) "of due execution of this act; that then every prior and particular person of his convent, and every dean and particular person of the chapter, and every archbishop and bishop, and all other persons, so offending and doing contrary to this act, or any part thereof, and their aiders, counsellors, and abettors, shall run in the dangers, pains, and penalties of the statute of the provision and *præmunire*, made in the five and twentieth year of the reign of King Edward the Third, and in the sixteenth year of King Richard the Second." I need not stop here to say the offence of *præmunire* is the offence of maintaining the papal power, in derogation of the power of the crown; and I do not conceive that the penalties of *præmunire* can be incurred by any person under this act, doing any matter or thing whatever, unless it is something in derogation of the power of the crown, and in maintenance of the authority of the Pope. And the question is, whether the archbishop, who is the party concerned, (though he acts, in this case, by the vicar general,) by admitting these parties to make their objections, and considering how far they are good, would do anything in derogation of the power of the crown, and also (for that appears to be requisite) in maintenance of that of the

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opposition
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right.

Mason's *Vin-
diciæ Eccles.
Anglicæ*.

Pope? Certainly it is not any derogation of the authority of the crown; because it has been supposed, directly contrary to the fact, that the power, the right, which we claim, to except, which we have been called upon but not permitted to do, interferes with the power of the crown to nominate the bishop, which is all the crown ever claims.

My lords, in this part of the case, of course I avail myself of the argument of my learned friend Sir *Fitzroy Kelly* in moving for this rule. And as this part of the case will be further urged by the learned gentlemen who will follow me, and my learned friend who ought to have preceded me, I will not say another word upon the construction of the act, except that the construction which is contended for does appear to me most unreasonable upon the face of it. As I shall presently show your lordships, it never was the construction put upon the act, in practice; because we find contemporary writers constantly speaking of the right which parties have, to appear and except to the election, to the progress of the election, or to the person of the party elected. We have an instance of this being done, in one case; and I shall presently call your lordships' attention to other cases, where the same was contemplated, and steps were taken towards the same, in which no parties ever dreamt that they were incurring the penalty of *præmunire*. It therefore follows, that this is not only a reasonable interpretation of the act, upon the face of the act itself, but that it is the construction which has always been put upon the act, from the time of its passing.

Now, I called your lordships' attention yesterday (*y*), among other extracts, to *Francis Mason's Vindiciæ Ecclesiæ Anglicanæ*. It was published in 1625, and not a very considerable time after the passing of the act. The author there lays down these orthodox principles (*z*); "After this, the Archbishop and Bishops, following the example of their predecessors, take care, publicly and preremptorily, to cite all manner of persons, who have any thing to say or object, either against the form of the election, or the person elected, in general, or particular, personally to appear before them. And when it appears solemnly, and judicially, by publick acts, both that the election is valid, and the person elected of sufficient learning and probity, then at last follows the consecration; which is perform'd by a competent number of lawful Bishops, according to the direction of the ancient canons. This is the solemn and constant method of making Bishops in England." He does not there seem to have considered that any *præmunire* was incurred by this judicial inquiry being gone into, or that the metropolitan was bound to consecrate, irrespective of any such inquiry.

Lord DENMAN. Who was *Francis Mason*?

Dr. *Addams*. He is a person of considerable authority. I do not know exactly what his history was; but he is repeatedly cited by *Gibson*. My learned friend (Mr. *Badeley*) says he was a clergyman and a prebendary of Westminster (*a*). He is cited all

(*y*) *Supra*, p. 283.
(*z*) The Royalty of the Crown,
p. 16.
(*a*) Francis Mason, B.D., Rector of
Sudborne and Orford, 1599: Chap-

lain to King James I, and Archdeacon
of Norfolk, 1619: died 1621: "wor-
thily stiled Vindex Ecclesiæ Angli-
canæ." Wood's *Ath. Oxon.*—*Strype's*
Parker, Book ii. ch. i.

through *Gibson*. It is a statement of a contemporary party; but it is quite immaterial to go to that; because, independently of the cases of Cardinal Pole and of Archbishop Cranmer, the case of Archbishop Parker, to which I have already called your lordships' attention, is surely perfectly conclusive. I cannot by possibility conceive where the doubt can be entertained that this was so, as far as the case of Archbishop Parker is concerned. But it seems we have no instances where this right has ever been insisted on, or has ever been reduced into practice; I mean the right of excepting. The single instance we have been able to produce has been treated with some sort of contempt; but, I think, such as it does not legitimately or properly deserve.

In Dr. *Field's* book on the Church, in the sentence I concluded with yesterday, the author, speaking of supremacy, says (b): "And herein" [the Prince] "is so farre supream, that no Prince, Prelate, or Potentate, hath a commanding authority over him; yet doe we not, whatsoever our clamorous adversaries untruely report, to make us odious, make our Princes with their civill states, supream in the power of commanding in matters concerning God, and his faith and religion, without seeking the direction of their Clergie,.....nor with them,"—(that is, with the clergy)—"nor with them, so as to command what they think fit, without advising with others, partakers of like precious faith with them, when a more generall meeting for farther deliberation may be had, or the thing requireth it." My lords, I would say that the thing does require more general deliberation, and that a more general deliberation may be had; the thing being the confirmation of the election of bishops. The matter has so proceeded from the earliest times. In the first instance, the clergy excluded the laity; then the election was in the diocesan clergy; and then the clergy of the cathedral excluded the diocesan; yet still the laity were never excluded in such a sense that they might not except to the confirmation and to the consecration of the bishop. This comes to us derived from the very earliest times. I hold in my hand a very valuable *Discourse on Church Government* by an archbishop of the Church of England, Archbishop *Potter*, "Wherein the rights of the church and the supremacy of Christian princes are vindicated and adjusted, by *John Potter*." He confines, as all sober persons speaking on the subject do, the supremacy of the crown to the sense which I have ascribed to it, and does not speak of it in the sense ascribed to it by the *Attorney* and *Solicitor General*. Towards the conclusion of his book he goes a great way into the history of the original constitution and appointment of bishops from the very first. He gives an account of the appointment of bishops and other officers; and then he states a great deal, which, though it is extremely valuable, I cannot venture to trouble your lordships with. Then, after stating that his design is chiefly to describe the practice of the early ages of Christianity, he quotes from the *Apostolical Constitutions*. I need not say that what are called the *Apostolical Constitutions* are not genuine; they are fictions of a later age; but still they show what

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Dr. Addams's argument.

Dr. Field on the Church.

The laity have always, from the earliest times, had some share in the appointment of their bishops.

Archbishop Potter, on Church Government.

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the notions of the age were. St. Peter, he says, "is introduced making the following decree: *I, Peter, do affirm, that a bishop must be ordained, as was appointed by all of us before, one who is blameless in all things, elected by the people for his eminent merit. Such a person being named, and content to undertake the office, let the people assembled on the Lord's day, with the college of presbyters, and such of the bishops as are present, approve him. Let the chief person of the assembly ask the college of presbyters and the people whether this be the person whom they desire to have for their ruler. Then let him ask, whether they do all attest that he is worthy of this great and eminent principality; whether he has been pious towards God, and just to men; has managed his own house well, and has been of an unblamable conversation. Then the people having all attested this of him, let him be asked a third time*"—(perhaps that may be the foundation of the præconization,)—"whether he is worthy of this ministry. And if they do all assent the third time, let them be desired to hold up their hands in token of their approbation; which being readily done, he directs the bishops to proceed to his ordination (c)." That shows that the people were consulted. There is much more to the same purpose; and then the work concludes with observations of this sort; showing that, in all questions, whether of the ordination of the lower orders, or of the superior orders, the laity are entitled to a voice. "So that the neighbouring bishops at this time had authority to disannul the elections made by the people and clergy of any city, even when the bishop elect wanted not ordination. But at other times, where mere presbyters were elected, it is manifest, the bishops had power to make the election void, because they could refuse to ordain them. The same may be said of priests and deacons, that how far soever the people had an interest in choosing persons to be admitted into those orders, what they did was never of the least force without the bishop's concurrence, because it was wholly in his power to ordain them or not. In the sixth canon of the council of *Nice*, cited in the last chapter, it is ordered, *that bishops shall be elected by the majority of voices; and if two or three dissent from the rest, they shall be concluded by the majority*. Who were the electors here meant is not expressed; but it seems not reasonable to think they were the people of the vacant diocese, because there could never be the least colour to pretend, that any two or three private men should vacate the election of a whole church, which would have made elections almost impossible; and therefore it is not likely any canonical provision should be made against it. So that we may reasonably conclude, these electors were the bishops of the province where the vacant diocese lay; especially since it is decreed by this canon, that the metropolitan should have a negative voice in the appointment of all the bishops within his province. And it is ordered by the fourth canon of this council, *that when any bishop was to be ordained, all the bishops of the province where the vacant diocese lay, should come together to ordain him; and if some of them could not come, at least three should ordain him, and the rest signify by their letters that they approved the person, and that all should be ratified by the metropolitan*.

Whence it is manifest, that the consent of the metropolitan and the majority of the comprovincial bishops was then required to the appointment of any bishop before he could be ordained. And in the following ages, when the popular elections of bishops occasioned tumults, which sometimes ended not without open acts of violence, and even bloodshed, to remedy this inconvenience, in some places the clergy, in others the emperors named bishops. From all which together we may conclude, that the power of appointing bishops and church-officers to exercise their functions in particular districts, is a thing of a mixed nature, and has never been wholly and constantly appropriated to any one sort of men, whether clergy or laity, but was lodged sometimes in one hand, and sometimes in another, as the times and other circumstances would best bear" (*d*).

My lords, the instance in which opposition was not merely threatened, but was actually carried out, and defeated in the way I am about to state, is a case which I am not going to read to your lordships, because it has been read over and over (*e*); and that was the case of the opposition to the confirmation of the election of Bishop Mountague, stated in *Collier*, and repeated in *Burn*; where it would seem, from the statement itself, totally irrespective of the reflection of Dr. *Burn*, that the opposition was not refused to be entertained upon any notion in the mind of Dr. Rives, that he would incur the penalty of a *præmunire*, if he permitted the exception. Dr. Rives was a good canonist and civilian, whatever might be his character in other respects, and was afterwards Queen's Advocate. He refused, because the exception was not tendered in due form of law; leaving it to be viewed as a necessary inference, that if it had been tendered in due form of law it would have been received. I cannot understand that this is not the necessary inference, totally independent of the reflection of Dr. *Burn* on the subject. I am not going to read the case again, but many comments were made upon what Dr. *Burn* said: "It hath been observed that Dr. Rives, a most eminent civilian and canonist, admitted that the opposition was good and valid, had it been legally offered; and that the parliament at that time proceeded upon the same opinion." Now, the objection to this passage is, that Dr. *Burn* does not state by whom the observation had been made; but what does it signify by whom? The observation is apparent upon the face of it.

Lord DENMAN. Are you aware what authority Dr. Rives had for saying that the objections must be in writing?

Dr. *Addams*. That is the constant course in the ecclesiastical courts: nothing *ore tenus* is received there.

The *Attorney General*. He says you cannot appear without a proctor.

Mr. Justice ERLE. Was Dr. Rives correct in his opinion that a suitor is not allowed a *locus standi* in an ecclesiastical court, except he appear by a proctor?

Dr. *Addams*. He may appear in person.

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Dr. *Addams*'s argument.

Mountague's case. *Burn*'s observation respecting Dr. Rives.

The apprehension of a *præmunire* no ground of refusal in that case.

The necessity of having the objections in writing.

Appearance by a proctor not necessary.

(*d*) Id. pp. 315, 316.

(*e*) Vide *supra*, pp. 45, 53, 101, 144, 161, 201, 240.

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Mr. Justice ERLE. Then Dr. Rives is wrong in one ground of his judgment.

Lord DENMAN. The very ground.

Mr. Justice ERLE. He gave as one reason why the party should not be heard, because he must appear by a proctor in that court.

Dr. Addams. It is so stated, I admit; but what I mean to maintain is this, that Dr. Rives did not shelter himself under the statute, by saying he should incur a *præmunire*.

Lord DENMAN. He sheltered himself under wrong reasons.

Dr. Addams. He sheltered himself under a wrong reason, inasmuch as the parties ought to be permitted to appear personally, and not necessarily by a proctor. But the exceptions should have been in writing and signed by an advocate.

Bp. of Man-
chester's case.

Mr. Justice COLERIDGE. The *Solicitor General* alluded to another case, a very recent case (*f*). I understand that the same reason was given, among others, for not proceeding in that case.

Dr. Addams. The same reason was given, among others. I will advert to that immediately. But there is one very material report of this case of *Mountague*, to which your lordships' attention has not been called.

The *Attorney General*. I think your lordships are misinformed with respect to that objection.

Mr. Justice COLERIDGE. I only speak from hearsay.

Lord DENMAN. It was rather thrown out for discussion.

Bp. Godwin's
account of the
opposition to
Bp. Mount-
ague.

Dr. Addams. I attended that confirmation, as counsel for the bishop; and I will state to your lordships what took place on the occasion. I am first going to call your lordships' attention to another report of the case of *Mountague*; which, I think, considering the person from whom it comes, and the mode in which it is stated, is not at all unworthy of your lordships' attention. I am citing this from Bishop *Godwin De Præsulibus Angliæ*. *Godwin* was a bishop of great learning, and a high churchman, much attached to the church, and the biographer of eminent bishops. In his account of *Mountague*, he states the case in this way; and I think it is worthy of some observation. Your lordships will see whether *Godwin*, among other persons, had any notion that the metropolitan, or the vicar general, (which is the same thing,) by listening to these exceptions would have incurred any penalty of a *præmunire*. From this passage it will also appear that the laity; as well as the clergy, were entitled to, and had a voice in the appointment of bishops, in the confirmation preparatory to the consecration, and in the consecration following upon the confirmation. Now in the life of *Mountague*, after stating who and what he was, the titles of his works, and so on, and after saying that he was impeached by the House of Commons, and not dismissed without being obliged to find bail, the writer proceeds in this way (*g*): "Ea vero injuriâ homini de se bene merito illata Regem ita commovit, ut illum præcipue ad episcopatum Cicestreensem evocaret. Illud autem memorabile accidit, eo die quo in ecclesiâ B. Mariæ de Arcubus, juxta solennem citationis formulam, episcopi jam jam confirmandi mores laicorum quoque

examine subiciuntur,”—(mark this from a bishop and a high churchman)—“adfuisset qui eum Arminianismi nescio cujus reum, et adeo Pontificiis faventem accusarent, eaque de causâ episcopatu prorsus indignum rejicerent. Verum cum calumnias potius quam argumenta proferre viderentur, subsecuta est aliquandiu impedita confirmatio, et consecratio.” Then he says it was on the 24th day of August, 1628. Then he speaks of his being translated to Norwich, his death, and his burial in the cathedral church at Norwich. Thus, *Godwin* seems to have considered that upon the occasion of the confirmation of the election of a bishop, there was to be an opportunity of objecting afforded not only to the clergy, but to the laity. He speaks of the quality of the objections set up in this case, that they were clamours rather than arguments: but he does not seem to intimate, nor does any one seem to intimate, the slightest impression, that the penalties of *præmunire* would have been incurred, if these exceptions had been received.

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Dr. Addams's argument.

His opinion concerning the right of opposition.

Mr. Justice ERLE. Is that *Godwin's* account of *Mountague*?

Dr. Addams. That is *Godwin's* account of *Mountague*.

Mr. Justice ERLE. Looking at the narrative of that fact, it would appear that the bishop was greatly misinformed upon the subject, because the charge was not considered, and was not ascertained to be a calumny.

Dr. Addams. Certainly: I do not cite it for that purpose.

Lord DENMAN. The extent of it is, that the *confirmatio* was *impedita*; but it seems to have taken place afterwards without any further question.

Dr. Addams. Yes; but what I say is this, that nobody seems to have been under an impression that if that exception had been entertained, the parties would have incurred the penalties of *præmunire*.

Mr. Justice ERLE. Is there any other narrative of the transaction, that the vicar general at that time did take the charge into consideration, and try whether it was a true charge or not?

The *Attorney General*. The Parliamentary History shows he did not.

Mr. Justice ERLE. I only wanted to see whether Bishop *Godwin* had any authority for what he said.

Mr. Justice COLERIDGE. Mr. *Attorney General*, I do not think the Parliamentary History shows that. It only shows that he did not decide in favour of the objections; nothing more (*h*). I was going to ask you if you had looked further into the life; because I think the case of Dr. *Mountague* was examined into by the Archbishop and others on the charges, and that he was held clear from the charges.

Dr. Addams. I am not aware whether that was so.

Mr. Justice COLERIDGE. There was a pamphlet published three or four years ago, in which that case was set out at length. You would probably look if there were any foundation for it in the life.

Dr. Addams. The nature of the intended objections, I have no doubt—

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Lord DENMAN. One can well understand that bishops may have been consulted upon such a charge, and inquiries made; but it would be important to see, if that took place, whether it was before or after the confirmation.

Dr. Addams. Probably, I think, after.

Lord DENMAN. Or before or after the *Congé d'élire*. If objections were known to exist, it is natural that inquiries should be made.

Mr. Justice COLERIDGE. They were rather formal inquiries, if I recollect. I have not looked at it recently: I read it some time ago. If I remember rightly, the objections there were not Arminianism, but too high notions upon the Real Presence.

Lord DENMAN. "Arminianismi nescio cujus reum," I think you read?

Dr. Addams. Yes, and also as a favourer of popery.

Bp. of Man-
chester's case.

Now, my lords, with regard to the nature of those intended exceptions, I have no doubt that they transpired, because I have no doubt that Jones and the persons who accompanied him took care to explain very largely what the nature of those objections were; and, as in the case of *Gutteridge*, the nature of the objections transpired, though they were not received. Now what took place upon that occasion was, I must confess, of a somewhat similar nature. The confirmation there was by commission; not, as in this case, by a vicar general. For in this case of Dr. Hampden's, I shall show that there was no commission (*i*), though it has been said there was; but the confirmation of Mr. Lee, as Bishop of Manchester, was in virtue of a commission issued for that purpose by the Archbishop of York; and there was also the permission, the formal permission, of the Archbishop of Canterbury that that confirmation should be held in his diocese. Now what took place was this. Mr. Gutteridge was the intended opponent, on grounds sufficiently notorious, which I have no right to avail myself of: but certain proceedings were had in this court,—from which no man could be ignorant of what was the nature of the objections to be taken by Mr. Gutteridge. What took place was this. One of the learned commissioners, upon Mr. Gutteridge presenting himself, inquired first his name. He said, Gutteridge. Then his profession; which he said was that of a surgeon. Then his residence; which he said was Birmingham. All which, I apprehend, was for the purpose of bringing out, by interrogatories to Mr. Gutteridge, that he was a person who had no peculiar interest in the confirmation or non-confirmation of Mr. Lee. He was not even an inhabitant of the diocese of which Mr. Lee was the bishop elect. When that was gone through, the same learned commissioner asked Mr. Gutteridge, whether his exceptions were in writing? He said they were, and tendered his exceptions. He was then asked whether they were signed by an advocate? He answered, they were not: and then the matter was disposed of in this somewhat anomalous manner. The commissioner said, there was an end of Mr. Gutteridge's exceptions, because they were not tendered in due form. But then he pro-

(i) Vide *supra*, p. 21, n.: *infra*, pp. 301 and 307.

ceeded to say, be that as it might, even if they had been, they could not have been entertained; because he and his brother commissioners sitting there were of opinion, that all they had to do was to confirm; and that they were obliged to confirm or incur the penalties; and confirm they should. And confirm they did. That was what took place upon the confirmation of the election of Mr. Lee.

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Dr. Addams's argument.

Now, my lords, before I go to what took place at Bow Church on the confirmation of Dr. Hampden, I was going to say, that though there is no instance upon record, with the exception of this objection to Bishop Mountague, of a person appearing in Bow Church, and objecting to the confirmation of the election, yet there are vestiges pretty apparent, and pretty plain, and some of them of palpable and positive results, of such an exception intended to be taken, by a caveat entered in the registry against the confirmation, of persons prepared to take the objection. In one instance the objection was not taken; perhaps not in both, because the occasion for it did not arise. It is well known that was so in the instance of Dr. Clarke; who, notwithstanding his great eminence, learning, piety, and incomparable services to religion, might be suspected of Arianism. It is well known that the then metropolitan, Archbishop Wake, would have objected to consecrate him; that an opposition was prepared and proposed to the confirmation of Dr. Clarke's election, if he had been recommended by the crown, and elected under a *Congé d'élire* to a bishoprick. But the same still more remarkably occurs in another instance, early in the last century, where the exception was only not taken because the occasion for it did not arise, under very peculiar circumstances. That was the case of Dr. Rundle, of whom Pope (j) said, "Rundle has a heart." Now Dr. Rundle was a man of considerable piety; but he had been early in life connected with Whiston, and he was supposed to entertain free opinions, and to have expressed himself with levity, in a bookseller's shop, on the subject of a remarkable Scripture narrative. Now, that being so, he was recommended by Lord Chancellor Talbot, to the vacant bishoprick of Gloucester; and there is one particular passage, (all this is upon record), that Venn, who was rector of St. Antholin's in the city, entered a caveat against the confirmation of that election, and threatened to oppose that election in Bow Church: and this he did with the perfect sanction of Gibson, at that time Bishop of London; which same Bishop Gibson supposed, (contrary, I think, to the true interpretation of the statute) that a *præmunire* would be incurred by the dean and chapter, if they did not elect the person named in the letters missive, but does not seem to have entertained a conception that *præmunire* would be incurred by a person appearing and objecting to the confirmation of that election in Bow Church. Bishop Gibson excited a great deal of ill will by the part he took, and the part it was supposed he would take, in objecting to the confirmation of Dr. Rundle to the bishoprick of Gloucester, if that election had taken place. In consequence, however, of that threatened opposition, Dr. Rundle was not elected to the bishoprick of Gloucester, but was appointed to the bishoprick of Derry in Ireland, where there was no

Vestiges of other cases of intended opposition.

Case of Dr. Clarke.

Case of Dr. Rundle.

Bp. Gibson.

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election and confirmation; and by that means the threatened opposition was avoided.

Lord DENMAN. In these two cases of Dr. Clarke and Dr. Rundle, of which I know little, except by this pamphlet (*k*), it does not appear whether they had been elected by the dean and chapter.

Dr. Addams. No, my lord.

Lord DENMAN. Only the archbishop announced an opposition; a great wish that he should not be elected. And Gibson, during the infirmities of the metropolitan, had expressed some desire to oppose; but it never came to any opposition.

Dr. Addams. Never. There was a caveat entered in the registry, supposing that the election had taken place; it being under the recommendation of the then Lord Chancellor; and it being supposed that the election was about to take place.

Lord DENMAN. It is mentioned afterwards (*l*), that queens Mary and Anne were much in the habit of consulting the archbishop. But all that took place, so far as I understand it, in the cases referred to, appears to have been in the way of not recommending to the dean and chapter for election.

Mr. Justice COLERIDGE. A caveat is a mere *ex parte* matter. May any one enter it without permission?

Dr. Addams. Any one.

Mr. Justice COLERIDGE. Without applying to the court?

Dr. Addams. Yes; and there is not only a citation against persons generally, but also there ought to be a particular citation to the party that has entered the caveat.

Mr. Justice COLERIDGE. That would entitle him to a citation nominatim?

Dr. Addams. To a citation nominatim. The whole of this history, so far as Dr. Rundle is concerned, is contained in a pamphlet published under the title "*Memoirs of Dr. Codex*;" Gibson being the author of *Gibson's Codex*.

The *Solicitor General*. Will your lordships allow me to say, it is also in the preface to Dr. Rundle's Letters, which has more character about it.

Dr. Addams. I have not troubled your lordships with reading the preface to those letters; but I have taken the liberty of citing the instance as merely illustrative of the general argument.

Mr. Justice COLERIDGE. You say, entering a caveat would entitle a party to be called nominatim: have you any authority for that?

Dr. Addams. If the ordinary course of ecclesiastical proceeding were carried out, beyond all question it would be so.

Mr. Justice ERLE. Under the general rule?

Dr. Bayford. I am not aware of any authority for saying, that any person entering a caveat must be cited nominatim.

Lord DENMAN. If he has a right to enter it.

Mr. Justice ERLE. Has he a right to enter the caveat? is the question.

Dr. Addams. I am astonished at that observation of my learned

A Caveat entitles the party entering it to a special citation.

(*k*) The Royalty of the Crown, &c., pp. 42—47.

(*l*) P. 55.

friend. A caveat is entered against a grant of administration; it is entered very commonly by the proctor in the name of A. B., or C. D., or John Nokes; and he is warned, as we call it, by the other proctor; and the party is bound to set out his interest; and when he has done so, nothing can be done in the case without notice to him.

Lord DENMAN. That is so, I presume?

Dr. Bayford. In the usual order of things, it would be so.

Dr. Addams. Now I hope I have satisfied your lordships that this act upon the part of the archbishop,—the act of confirmation by the metropolitan,—is not a ministerial but a judicial act; and that the statute of Henry 8 has made no difference in this respect; but that it continued after, as before, a judicial act, and was judicially conducted. And I cannot at all understand how it could be contended, for one moment, even upon the proceedings which have taken place with regard to the confirmation of Dr. Hampden, that it could be considered a ministerial act. Because what is the course of proceeding, upon the letters patent being sent to the archbishop, signifying the election of the party? He endorses those letters patent with the words, *Fiat confirmatio*; and then, according to the regular course of the proceedings, which has subsisted for centuries, (at least for a time long anterior to that instance of Mountague), the judicial proceeding which constitutes the confirmation of the election is undertaken by the vicar general: there is no commission. It has been stated to your lordships that that was by commission from the archbishop, and a learned person has been said to have been one of the commissioners; but there was no commission; the matter was conducted in the court of the vicar general; and the learned persons who have been adverted to, and one of whom spoke at Bow Church, sat as assessors to the vicar general, and not as commissioners. I believe one of them did style himself a commissioner; but if so, it was under a misapprehension; for in point of fact there was no commission (*m*), but the business was undertaken by the vicar general, in his regular character as an officer of the archbishop. Now independent of what appears to have taken place upon the confirmation of Archbishop Parker, how is it here? Can any one pretend to say for one instant, that this was not a judicial proceeding? For parties were cited on a previous day, to appear; and the court was held; a proxy for the dean and chapter was exhibited; the dean and chapter gave in an allegation, called a summary petition; they examined witnesses in support of that allegation; persons were cited to oppose; and there was a formal sentence, a definitive sentence in writing. If that does not constitute a judicial proceeding, what does? Can it be said for a moment that this was not in the court of the vicar general, or that the vicar general had not jurisdiction to entertain such a suit? Why, it was judicial: and if, in the course of a judicial proceeding, we are cited to appear, and are ready and offer to appear, and are prevented from appearing, and are denied justice from the ecclesiastical judge misconstruing an act of parliament, surely that is a case in which we are entitled to come to this

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Dr. Addams's argument.

The course of proceeding, after the commission to the archbishop, proves the confirmation to be a judicial act.

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Dr. Addams's
argument.

Reasons given
by the ecclesi-
astical judges
for refusing to
hear the op-
posers.

court for relief, whether by prohibition or mandamus, or both, as occasion may require.

Now, my lords, it has been stated, as with reference to all this, by the learned person (*n*), who sat, (not as a commissioner, but as one of the assessors to the vicar general), that the whole question, in point of fact, turned upon the statute; for upon that he put it. The proceedings in Bow Church were these: a proctor offered to appear for the gentlemen in whose behalf this application for a mandamus is made; an objection was taken to his right to appear; and I, as counsel, desired to be heard upon that right to appear. And from what had taken place on the confirmation of Mr. Lee, I was inclined to believe and did believe, and was told in so many words in effect, though not in terms, that I must confine myself to the statute. So it was stated, You would have a right to appear, but for the statute; and our difficulty is, that you cannot appear, by reference to the statute: by permitting you to appear, we should incur the penalty of *præmunire*. Upon that I addressed the learned vicar general, confining my observations to the act of parliament, merely to show that upon the true common interpretation of that act, no *præmunire* could be incurred, if the vicar general permitted the objections to be tendered, and received these objections, if made in due form of law.

Dr. *Bayford*. My learned friend is not stating that quite correctly; because one of the assessors distinctly repudiated that, and said it was not a question in his mind as to *præmunire* (*o*), but as to the necessity of proceeding.

Dr. *Addams*. My learned friend has interrupted me a second time; if he had only heard what I was about to say, he would have saved himself the trouble. I was stating the circumstances under which I addressed the court: I confined my observations, as I was told to do, to the statute. When I finished, I was followed by another learned counsel; but the learned assessor at that time, I apprehend, had some misgivings, as if I had removed that objection arising from the statute: and then, when the learned counsel proceeded to follow upon the statute, "No," said the learned judge, "we do not mean to confine you to that; there may be other objections; you must satisfy us of your right to appear generally." Therefore I was quite right: and my learned friend too; only it was at different times. Then other reasons were stated why we ought to be permitted to appear, if the statute was out of the question. And the learned assessor disposed of the case in this way: what he said was this, in substance; "Well, perhaps you are more right about that. I do not say; but perhaps no *præmunire* might be incurred;—there may be different opinions about that." But what did he also say in substance? "Never mind the statute; we sit here to confirm; and confirm we will." And he was preceded by the vicar general, who put it entirely upon the construction of the statute; though the learned assessor said, "We sit here to confirm; and confirm we will." I say, that was the course the matter took.

(*n*) Dr. Lushington.

(*o*) *Supra*, p. 69.

Now the statute of the 1st of Edward 6, chapter 2, has been adverted to (*p*); and it has been mistaken; though very forcible observations have been made upon it. The preamble of that statute has been read; and it has been read for the purpose of showing,—(I will show your lordships how entirely it was mistaken),—it has been read for the purpose of showing that the whole of this proceeding is a mockery, a sham, and a shadow, which ought to be dispensed with, and swept away, and which should not be listened to. And it was very much in that view of the case that the court spoke at Bow Church. It is by this statute of Edward 6 that all bishopricks were made donative; and the following is its preamble. “Forasmuch as the elections of archbishops and bishops by the deans and chapters within the king’s Majesty’s realms of England and Ireland, at this present time, be as well to the long delay, as to the great cost and charges of such persons as the king’s Majesty giveth any archbishoprick or bishoprick unto: And whereas the said elections be, in very deed, no elections, but only, by a writ of *Congé d’élire*, have colours, shadows, and pretences of elections, serving nevertheless to no purpose, and seeming also derogatory and prejudicial to the king’s prerogative royal, to whom only appertaineth the collation,” and so on. Now, what is all sham and shadow? Why, the election by *Congé d’élire*. But the confirmation of elections is not a shadow, and a sham:—quite the contrary:—it is the approbation of the election; it is the warranty; and it is all one, whether the election be by the crown, by the *Congé d’élire*, or whether it be by collation, or gift, and appointment. Now, my learned friend, the *Solicitor General*, with that strength of argument which I am sure becomes his strong mind, showed his indignation, and expressed his great horror of shams and shadows; and he said, this was a sham and a shadow. But his words applied not to the confirmation, but to the election itself; and I quite agree with him, that this election by *Congé d’élire* is a sham and shadow, and as such had better be swept away by some statute; but not the confirmation of the election. But when my learned friend talked of shams and shadows, and expressed so much indignation, I wonder it did not occur to him to express his indignation at this sham and shadow, that persons should be solemnly cited to appear, and promised that they should be heard if they do appear; and then when they do appear, with great pains and some expense to themselves, and are prepared to put in their exception, instead of being heard, they are told they shall not be heard at all. They are pronounced contumacious for not appearing, though they are extremely anxious to appear and be heard. Now that is a sham and shadow; and if my learned friend had expressed his indignation against that, he would have expressed it with some degree of truth.

LORD DENMAN. Pronounced contumacious for not appearing, though they are extremely anxious to appear and be heard. I understood the *Solicitor General’s* indignation applied to all this.

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Stat. 1 Edw. 6, c. 2, applies to elections, but not to confirmations.

(*p*) *Supra*, pp. 138, 196, 253. The material parts of the stat. are given in p. 42, n. (*a*).

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The *Solicitor General*. Yes, to every word of it.

Dr. *Addams*. I think that is a sham and shadow. And if this form of election is to be maintained, and if we are not to be heard, I think the best thing my learned friend, the *Solicitor General*, can do, is to bring in a bill to this purport—that in future, all confirmations, whether in Bow Church or elsewhere, shall be made upon the first of April: and if so, there may be something in it; because if parties are cited, and are not allowed to appear, it will only be carrying out the old joke of making people April fools.

I trust I have said sufficient to dispose of the first objection, namely, that this is a ministerial and not a judicial act. For it is a judicial act, and a judicial act upon which, according to principle, and precedent, and authority, so far as it goes, we have a right to appear and be heard.

Mr. Justice ERLE. If the statute of Edward 6 put an end to election by *Congé d'élire*, would it not also put an end to confirmation?

Dr. *Addams*. Undoubtedly.

Mr. Justice ERLE. 'Then the whole was put an end to by that statute.

Dr. *Addams*. Yes, because confirmation is only the confirmation of the election. But, I say, it does not follow by any means, that though there was no confirmation of the appointment by any judicial act, therefore the metropolitan had no means of satisfying himself, in some form or other, as to the fitness of the person to be consecrated, before consecration. In the case of election, there was a regular judicial form, we know. It is contended, in the case of election, that, under the act, that form was altogether abolished; that the confirmation of the election itself was abolished; that, upon the transmission to the metropolitan of the letters patent, he could do no other than confirm; and that if he did not confirm, it was at the peril of *præmunire*. I think I shall presently show your lordships that in the case even of appointment, there was a confirmation of the appointment, only it would not be in the same form as the confirmation of an election by a regular judicial act, well known to the law, in use before the Reformation, and in practice after the Reformation. I submit to your lordships, therefore, that this was a judicial act, in the course of which we were cited to appear, and in which we had the right to appear, *non obstante statuto*. And if that be so, I think there can be no doubt but that this is a case in which, upon general principles, a mandamus would lie.

No remedy by
appeal, in the
present case.

But the second objection taken to the issuing of the mandamus is this; (and if the objection be correct in point of fact, it would form a material, and perhaps an insuperable objection to your lordships making this rule absolute). The *Attorney General* contends; first, that the act is ministerial:—secondly, he says, if it be judicial, it is an act from which we might have appealed (*q*), and we have no right to come for a mandamus. If we had a remedy by appeal, if the ecclesiastical judge is mistaken and there was a means of correcting his erroneous judgment by appeal, we have no right to come for a

mandamus. Now, my lords, the learned *Attorney General* was pleased to say, we had a perfect right to appeal; and we were promised cases in which parties under similar circumstances were permitted to appeal. That promise, like some others, was broken; for my learned friend from the ecclesiastical court addressed your lordships at considerable length: and though I was prepared to expect that the assertion of the *Attorney General* would be fortified by the gentleman from the ecclesiastical court who addressed your lordships, yet it was not pretended to be said, it was not even asserted, much less attempted to be fortified by reference to any case, that these parties had any appeal. And therefore I think I am almost relieved from the necessity of answering that objection. I state to your lordships, positively, from my knowledge of the ecclesiastical courts, (which is not slight,) that the parties have no remedy by appeal; that there was no possibility of appeal in this case; that there could be no appeal. The course this matter took at Bow Church I have stated. A proctor appearing in court was addressed by the assessor of the vicar general in these terms, "Mr. Townsend, for whom do you appear?" the proctor stated for whom he was prepared to appear. The proctor stated, that he appeared for the gentlemen upon whose behalf I am addressing your lordships now; and upon that he proposed to tender an allegation, or libel, or articles, (whatever they were,) containing in writing the exceptions about to be taken. Now, my lords, immediately, the assessor said, "You, as an ecclesiastical practitioner, ought to know that you cannot give in an allegation till you have established your right to appear;" and he concluded, after hearing an argument, by refusing to permit the parties to appear. Consequently they did not appear on the record as parties at all; and there is no possibility of an appeal. If the appearance had been recorded, and then the articles had been rejected, why then there would have been a remedy by appeal: and your lordships would have refused the remedy by mandamus. And upon that very ground your lordships did refuse the remedy by mandamus in various cases; in one in particular, the case already cited (r), the Bishop of St. David's v. Lucy: but in this case there was no possibility of appeal. I stated that I attended as counsel for Mr. Lee, not as counsel for the party wishing to oppose, but as counsel for the bishop; but if, on that occasion, I had attended for the party who was disposed to object, (which I should not have done from the nature of the objection, for I should have refused to put my name to it, or to have attended as counsel for such a party,) but if I had, what I should have done unquestionably would have been this. When the commissioner desired to know what the exceptions were, whether they were in writing and so forth, I should first have insisted upon the appearance being recorded. The objector's name would thus have appeared on the record; and then, if the allegation, or whatever it was, as of a party who had so appeared, had been rejected, either in point of form, or in point of substance, in that case there would have been an appeal: and if there had been a remedy by appeal, on the ground that the ecclesiastical judge had misconstrued the ecclesiastical law, it would not have

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The present
parties were
not suffered to
appear.

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(r) *Supra*, pp. 209, 254.

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Answer to the
objection that
the ecclesiastical
court had
no means of
investigating
the subject-
matter of
inquiry.

The vicar
general's
jurisdiction.

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been a case for a mandamus. But may I take the liberty of saying, that, in the present case, there was no possibility of appeal, and that the parties have no possible remedy, unless your lordships will make this rule for a mandamus absolute? At least there is no pretence for that objection to the issuing of the writ, which has been taken by the *Attorney General*; for, with reference to this proceeding, if it be a judicial act, (and most unquestionably it is a judicial act,) it was an act for which there was no remedy by appeal.

My lords, the third objection was this, and a very material one, that the court in which these exceptions were tendered had no means of investigating the subject-matter of inquiry; added to which, the inquiry could not be concluded within twenty days (s). That was very forcibly dwelt upon by the learned counsel from the ecclesiastical court, who proved to demonstration that if the exceptions had been entertained,—(as they might, though I do not say they would have been; because the allegation, either in itself, or from the way in which those exceptions were tendered, might have been rejected, with reference to this objection, that the court could not proceed, having been forbidden by the provisions of the Church Discipline Act)—but still I say, the argument is satisfactory to show that if these exceptions had been raised, and there had been a counter allegation on behalf of the bishop elect or the dean and chapter, (no matter which,) the investigation could not have been concluded within twenty days. First, as to this being a court which had no means of investigating the subject-matter of inquiry. Upon this, your lordships were referred to *Oughton*: and the quotation from *Oughton* was to this effect, that the vicar general had no contentious jurisdiction. In the third part of his *Prolegomena* (t), he says, “Qui Cancellarius (sive Vicarius in spiritualibus generalis) ea quæ contentiosæ jurisdictionis erant non exercebat, id est, causarum inter partes, in foro contradictorio, decisionem, (præterquam, quæ pro formâ solummodo ventilantur; utpote, negotia confirmationis episcoporum electionis, et similia) sed ea, quæ sunt officii meri, gerebat: præcipuè, quæ jurisdictionis dicuntur voluntariæ; prout commissio custodiæ spiritualitatum,” &c. The purport of this is, that the vicar general had no contentious jurisdiction. By contentious jurisdiction I understand, cases in which there are parties litigant, parties setting up opposite interests. Then he adds, “except such as are merely formal, namely, the business of confirmation of the election of bishops, and other matters of that sort.” Now this will appear a little singular upon the face of it; because it reads in this way: the vicar general has no contentious jurisdiction, except in those cases which are not contentious, such as the business of the confirmation of the election of bishops. Now what is the meaning of that? Why, there is but one rational meaning to be put upon it; namely, that the vicar general has no contentious jurisdiction, except in those cases which become contentious, but which ordinarily are not contentious, though they may become contentious; and when there are litigant parties, there is an end of his jurisdiction. No other interpretation can be put upon this passage; the true meaning of which is, that the moment the jurisdiction becomes contentious, then it ceases. What happens then? Why, in the first place, from

(s) *Supra*, 143, 192, 206, 230.

(t) Vol. 1. p. xvi. Vide *supra*, p. 225.

this document, which has been already before your lordships, (I mean the record of what took place on the confirmation of Archbishop Parker,) it appears that the vicar general's court could entertain a contention, and there was an adjournment of the court (*u*), as appears at page 184, of this third volume of *Bramhall's* works, as published in the *Library of Anglo-Catholic Theology*. But what is to become of the case, supposing in this particular instance that the exceptions had been permitted to be rendered, and those exceptions had been received, and that the case had proceeded? Why, my lords, the vicar general would have referred the further hearing of the case to the Court of Audience, to the metropolitan himself, who in point of strictness is the party to confirm, and who only deputed it to the vicar general, by indorsing *Fiat confirmatio*. We may assume that some of the cases did not become cases of contentious jurisdiction; but if they did, then they would have gone to the Court of Audience, where the archbishop would have determined, and will determine this, (if your lordships grant a mandamus), with the assistance of the provincial bishops.

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Parker's confirmation.

Court of Audience takes cognizance of the matter, when it becomes contentious.

The *Attorney General*. I understand, my lords, that during my absence, my learned friend, unadvisedly, of course, has stated there was no commission issued (*v*). Here is the commission (*producing a parchment*) directed to Dr. Burnaby, Sir John Dodson, and others.

Archbishop's commission to confirm Dr. Hampden.

Dr. Addams. I was misinformed, especially as we have not the same facilities of reference to the Registry as my learned friend; and I never heard of this commission before (*w*). But then comes what at all events is something peculiar in this case; because we have always understood that upon former occasions, there was no commission, but that it was referred to the vicar general by the archbishop indorsing it with the words, *Fiat confirmatio*.

Now then the vicar general, or the commissioners, would have referred the further hearing of this matter to the archbishop in the Court of Audience; and that is still an existing court; for in the very next section in *Oughton*, with reference to that Court of Audience, what is said by him is this (*x*): "Nullus autem, a plurimis abhinc retroactis annis, extitit Audientię judex; utpote, forensis: Hęc, itaque, curia Audientię Cantuariensis omnino jamdudum exolevit: nisi quatenus ipse (nonnunquam) Archiepiscopus"—(this would be just such a case)—"in arduis (utputa, deponendis episcopis, aut similibus) audientiam suam celebrat, in propriâ personâ, et proprio in palatio, cum auditore speciali, sive auditoribus, ad hoc specialiter constitutis, pro istâ vice, una secum assidentibus."

The last sitting of the Court of Audience was in that case of Bishop Watson.

Mr. Justice COLERIDGE. Will you give us the page in *Oughton*.

Dr. Addams. Page xvi., sections 10 and 11, in the *Prolegomena*. To show your lordships that it is a subsisting court, and recognized as such, the last mention of the sitting of the Court of Audience was in that case; and I am citing it from Lord *Raymond's* report of

Last sitting of the Court of Audience. Bp. of St. David's v. Lucy.

(*u*) "Cum continuatione et prorogatione dierum extunc sequentium, et locorum, si oporteat," &c. Vide *supra*, p. 62, n.

(*v*) *Supra*, pp. 298, 301.

(*w*) Vide *supra*, p. 21, n.

(*x*) Ord. Jud. vol. 1, p. xvi. Vide *supra*, p. 225.

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The Court of
Audience a
subsisting
court.

Answer to the
objection that
the inquiry
could not be
concluded
within twenty
days.

Stat. 26 Hen.
8, c. 14, for
nomination of
suffragan
bishops, allows
time for "law-
ful impediments."

it (y). There, an application was made to this court by Dr. Watson, of St. David's, who had been cited before Archbishop Tennyson, in his court held at Lambeth; and one of the exceptions was, that there was no such court. The first ground, upon which the prohibition was moved for, was this; "That it does not appear that the Bishop of St. David's was cited to appear in any court whereof the law takes notice." There were other reasons stated; and *Holt*, chief justice, disposed of this objection in this way. "The admitting of that point of the jurisdiction to be disputed would be to admit the disputing of fundamentals, which the counsel of the other side attempt to subvert, not duly considering the respect due to the primate and metropolitan of England; for the Archbishop of Canterbury has without doubt provincial jurisdiction"—and so on.—"And the citation is here, to appear before the archbishop himself, or his vicar general, who is an officer of whom the law takes notice; for the vicar general in the province is of the same nature as the chancellor in every particular diocese; and the Dean of the Arches is the vicar general of the archbishop in all the province." I only state this to show that the Court of Audience is a recognized court for such matters; and it would be the duty of the vicar general, or the commissioners (for I do not know that it makes the slightest difference in that respect) to refer the matter to the archbishop in this Court of Audience, who would then have to determine it.

But with reference to the objection, that the inquiry could not be completed in twenty days, can it be suggested for an instant, with any plausibility, that that could be any objection to the case being entertained? The Archbishop is to confirm and consecrate within twenty days: but what does that suppose? Why, it supposes that there is no reasonable impediment; but if there had been any reasonable impediment, which would defer the confirmation and consecration beyond twenty days, can it be supposed that there would be a penalty of *præmunire* incurred under the statute, because the consecration was not completed in twenty days? That appears perfectly extravagant; because the person elected might be prevented by gout, apoplexy, or whatever it might be, from attending at the confirmation, and of being present in person (which he must be) at consecration; which then could not be completed within twenty days. The statute must be supposed all along to mean, that the ceremony ought to be completed within twenty days, unless there are reasonable impediments; and if that qualification is not stated in the statute, it is necessarily inferred. And so it was in the case of suffragan bishops; which will better illustrate the point I am about to submit to your lordships.

The statute of the 26th of Henry 8, c. 14, is "for the nomination of suffragans, and the consecration of them;" who must be consecrated as well as provincial bishops. In the statute, the several towns are set out which are to be the sees of suffragan bishops; Thetford, Ipswich, Colchester, Dover, and a number of others; and it provides that where a bishop desires the assistance of a suffragan bishop, he is to name two persons to the crown, and the crown is to name one of them, and desire the archbishop to consecrate him, and

he is to be consecrated bishop of one of those towns "within the same province whereof the bishop that doth name him is." Now these suffragan bishops are to be presented, under the 3rd section of the act: "And after such title, style, and name so given as is aforesaid, the king's Majesty shall present every such person, by his letters patents under his great seal, to the Archbishop of Canterbury, if the town whereof he hath his title be within the province of Canterbury, and likewise to the Archbishop of York, if the town whereof he hath his title be within the province of York, signifying and declaring, by the same letters patents, the name of the person presented, and the style and title of dignity of the bishoprick whereunto he shall be nominated,"—(now I beg your lordships' attention)—"requiring the same archbishop to whom such letters patents shall be directed, to consecrate the said person so nominate and presented, to the same name, title, style, and dignity of bishop, that he shall be nominated and presented unto, and to give him all such consecrations, benedictions, and ceremonies, as to the degree and office of a bishop suffragan shall be requisite." And then, my lords, in section 5, follows this, which is extremely material as to the twenty days: "And be it further enacted by authority aforesaid, that every archbishop of this realm, to whom any of the king's letters patents, in the cases afore rehearsed, shall be directed, having no lawful impediment,"—(I beg your lordships' attention to this)—"having no lawful impediment, shall perform and accomplish the effects and contents of this act, within the time of three months next after such letters patents shall come to their hands; any usages, customs, foreign laws, privileges, prescriptions, or other thing or things heretofore used, had, or done to the contrary hereof notwithstanding." Why, then, the archbishop had three months to consecrate, after the reception of the letters patent. But it was only to be done within three months, there being "no lawful impediment;" and it is expressed in this act, but it is implied in the other. And can it be supposed for a moment that the penalty of *præmunire* would be incurred, because the consecration was not completed within twenty days, if it was prevented by these exceptions being entertained, and proof of these exceptions being given, the exceptions being such as ought to be entertained?

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Dr. Addams's argument.

My lords, in going into the last ground of objection, that this is not a case for a mandamus, I would beg to say a word or two with regard to the right of the parties, and the sort of interest which the parties have, who have come before your lordships to apply for a mandamus. This is not the sort of case, I admit, which ought to be entertained, if it resembled the case of Mr. *Gutteridge*. These are not parties who come forward without a real and substantial interest. Even upon the face of the affidavit, two of these persons are beneficed clergymen within the diocese of Hereford, to which Dr. Hampden is elected bishop. As such, they have an interest: they represent a large class of persons, who view the teaching of Dr. Hampden at least with suspicion. My lords, it was pleasantly thrown out by the *Attorney General* (z), that this might be something like the trial and record of one *Faithful*, of whom *Blindman* said, "This man is a heretic." Now the artificial *Blind-*

Question of mandamus.

Interest of the opposing parties.

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Dr. Addams's
argument.

Nature of the
objections pro-
posed to be
taken.

Injurious con-
sequences of
holding that a
mandamus will
not lie.

No injurious
result from
granting it.

Remarks upon
the cases cited
on the question
of mandamus.

man who applies consists of very many well discerning persons, among whom there are thirteen bishops (*a*). And with regard to the nature of the objections proposed to be taken, it is said they are proposed to be taken as with reference to a work published by Dr. Hampden many years ago, upon the subject of the inexpediency of dogmatism in theology. Why, it is not the subject of the work that constitutes its offensiveness; for all that might be entered into without involving any unsound teaching; but it appears by the affidavit, not merely that these works are upon that subject, but that, in the handling of that subject, he has spoken in derogation of the Book of Common Prayer, and the thirty-nine Articles (*b*). Surely, then, there is something of substance in the objections intended to be taken. And what possible inconvenience, or serious inconvenience, could ensue from this being investigated, compared with the dreadful injury that must result, if your lordships hold that this writ of mandamus will not lie? Because, if your lordships hold that this writ of mandamus will not lie in this case, it never will in any other; and the consequence will be, that the clergy and the laity,—and especially the clergy,—of this country, will be deprived of the opportunity of excepting to the consecration of a bishop, upon whatever ground their exceptions may rest; and the then metropolitan will be compelled, without any possibility of inquiry into the fitness and character of the person elected, absolutely and imperatively, under the penalty of a *præmunire*, to proceed to a consecration within twenty days, whatever may be his opinion, and the general view entertained of the fitness or propriety of the person whom the crown has nominated; and the crown (the king or the queen) will be claiming a supremacy, in a sense and to an extent that the crown has altogether disclaimed. On the other hand, what will be the great objection to issue the mandamus, supposing your lordships grant it, and supposing the court of the vicar general is again held, and supposing these exceptions are received, and they are in due form of law, and the parties go to a trial, as they say, in the Court of Audience before the Archbishop? Why, the suspected unsoundness of Dr. Hampden's teaching will then be put to the test. If it be found to be sound, well! He will take his seat on the bench, with infinitely greater satisfaction to himself, and greater advantage to the public. But if it be found unsound, he may either disclaim it, which if he does, his consecration may proceed; or if he justify it, if he justify unsound teaching, what will be the consequence? The consequence will be, that this election ought not to be confirmed, and it will not:—it will not be good to all intents and purposes:—the crown will appoint again, because the letters missive, I admit, are all sham and shadow; and then all parties will be benefited by the result.

Now with regard to the question of this not being a case for a mandamus, I do not feel myself called upon to answer that. I was extremely unwilling at all to undertake this case, though thrown upon me accidentally; but I would rather leave this part of it to the learned gentlemen who are to follow me. So far as I understand the cases in support of the principles on which this court was asked to refuse

(a) *Supra*, p. 6.

(b) *Supra*, p. 91.

to issue a mandamus, I could not collect that there was any one which, in the slightest degree, touched this case. In many of those cases, there was a remedy by appeal: in very many of those cases there was an erroneous decision. It is not the case that there was any decision here: there was no decision at all: we have not been heard: we have not been admitted to a right, which we insist we have, owing to the ecclesiastical judge having misconstrued an act of parliament. And if that is not a ground for a mandamus, where we have no other remedy, and where we have a substantial right, I confess, so far as my humble judgment goes, I do not know what a case for a mandamus is. I will only refer to one case which was cited on the subject, where a mandamus was refused; because it will illustrate what I have said about other parts of the case; and that is the case against the Bishop of St. David's (*c*). In that case, there was first an application for a prohibition, which was refused; and there was afterwards an application to this court, pretty much in the nature of the present application to your lordships, an application, in effect, for a prohibition and a mandamus, at one and the same time. Now the learned counsel who moved for this mandamus, did not expressly move for a prohibition and a mandamus, though at the time when he moved for a mandamus, he suggested that a prohibition might also be moved for (*d*). But it was unnecessary to apply for a prohibition in this case, because there was served upon the archbishop the rule to show cause, and the archbishop properly abstained from proceeding to confirmation, as he would of course. But in this case I am now going into, cited from *Salkeld* (*e*), there was an application for a prohibition and a mandamus; and the application for the prohibition was, to stay the delegates from taking any proceedings, in the appeal from the sentence of the archbishop, upon the suggestion that, by the canon law, the archbishop alone could not proceed; and then there was an application for the grant of a mandamus, because the delegates refused to admit the bishop's allegation. Now the prohibition was refused by Lord Holt and the rest, upon the ground that an archbishop had power over certain cases, and had power to act as he did: so the prohibition was refused. And then it was moved that the court would grant a mandamus to the delegates to admit the bishop's allegations: and it was compared to the cases where they grant mandamuses to compel the granting of probates of wills or letters of administration. "But, per Holt, C. J., the king's bench cannot grant a mandamus to them, to compel them to proceed according to their law. Indeed mandamuses were grantable to compel probates of wills, because it concerns temporal right; and to complete the granting of letters of administration, because the statute directs to whom they shall be granted. But in the present case a mandamus was denied." Why was it not granted? Why, because the delegates refused to admit the bishop's allegations: the bishop was a party in the cause; he tendered certain allegations to the court, and those allegations were rejected. In an inferior court that would be ground of appeal; but being rejected in a superior court, there was no remedy. They could not apply to this court for a mandamus;

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(*c*) Vide *supra*, p. 254.

(*d*) *Supra*, p. 118.

(*e*) 1 Salk. 134; 1 Ld. Raym. 447,
539.

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because the delegates who were then sitting as an ecclesiastical court determined the ecclesiastical question according to their law. It was for them to say whether the allegations were admissible. If this had been in an inferior court, the remedy would be by an appeal: being in a superior court, there was no remedy at all. But our's is not that case: if we had been permitted to appear, and had tendered the allegation, and if our appearance had been recorded, and the application had been rejected, then the remedy would have been by appeal. And then the case would have gone before the archbishop and the Court of Audience, from which there would be no appeal. Had we tendered an allegation, and that allegation had been rejected in that court, then we should have no remedy by appeal, nor any remedy by mandamus; because it would be an ecclesiastical proceeding, decided according to ecclesiastical law. But this is not the case of an ecclesiastical court coming to an ecclesiastical decision according to their law; it is the refusal of an ecclesiastical judge to permit parties to appear; and that, owing to a misconstruction of an act of parliament. Now, according to all the principles I can understand upon which a mandamus shall issue, this is peculiarly the case in which a mandamus ought to be issued.

I have to apologize for the great length of time which I have occupied. I would rather not have undertaken this case, which has devolved upon me accidentally; but I have endeavoured to do my duty to the best of my ability.

Mr. Stephens's
argument.

Mr. *Stephens*. After the lengthened and able disquisition your lordships have heard from my learned friend, Dr. *Addams*, it will not be requisite for me to trespass upon the indulgence of your lordships to any great extent. It is my intention to make but few observations upon the statute of Henry 8, and to confine those to strictly legal points; because one of my learned friends, who is about to follow me, will, I feel perfectly satisfied, exhaust that subject, so far as the canon law applies to it.

Object of stat.
25 Hen. 8,
c. 20.

The object of the statute of Henry 8, c. 20, was entirely to annul and destroy the power of the Bishop of Rome, and to vest in the Archbishop of Canterbury the power of confirming and consecrating, without any appeal to Rome. I will shortly direct your lordships' attention to the language of the 5th section. It is there enacted, that, "if the said dean and chapter, or prior and convent, after such licence and letters missive to them directed, within the said twelve days, do elect and choose the said person mentioned in the said letters missive, according to the request of the king's highness, his heirs or successors, thereof to be made by the said letters missive in that behalf, then their election shall stand good and effectual to all intents; and that the person so elected, after certification made of the same election, under the common and covent seal of the electors, to the king's highness, his heirs or successors, shall be reputed and taken by the name of lord elected of the said dignity and office that he shall be elected unto: and then making such oath and fealty only to the king's majesty, his heirs and successors, as shall be appointed for the same, the king's highness, by his letters patents under his great seal, shall signify the said election, if it be to the dignity of a bishop, to the archbishop and metropolitan of the province where

the see of the said bishoprick was void, if the see of the said archbishop be full and not void; and if it be void, then to any other archbishop within this realm, or in any other the king's dominions; requiring and commanding such archbishop, to whom any such signification shall be made, to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same, without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome for the same, in any behalf." Your lordships will observe that the powers of confirmation are not given to the archbishop by this statute; but they are recognized as being in him already; and all that the statute does, is, to require him to confirm and consecrate the bishop, without suing to Rome, so that the continued subsistence of all the other ancient pastoral rights, duties, and privileges, belonging to the archbishop, is to be perfectly inferred from this act of parliament. Now, in the 7th section it is said, "If any archbishop or bishop within any the king's dominions, after any such election, nomination, or presentation shall be signified unto them by the king's letters patents, shall refuse, and do not confirm, invest, and consecrate with all due circumstance as is aforesaid," he shall incur the penalties of a *præmunire*. Now the refusal meant there, is a wilful refusal; that is, if the archbishop refuse to confirm and consecrate, against the laws and statutes of this kingdom. Now, my lords, the language of the letters patent, upon the present occasion (*f*), confirm this construction; because they do not command the archbishop to confirm and to consecrate absolutely, but they command the archbishop to confirm in accordance with his pastoral duties, and the laws and statutes of this realm. The intention of the legislature cannot perhaps be better discovered, than by accurately ascertaining the mischiefs which the act was intended to rectify. Now what were those mischiefs. Why, to destroy the power of the Pope of Rome in this kingdom; not to interfere with the ancient pastoral rights or duties of the archbishop. My learned friend, Dr. *Addams*, has, I humbly submit to your lordships, irrefragably established this position,—that, anterior to the 25th of Henry 8, c. 20, by the common law of the land, the archbishop confirmed judicially. And, therefore, the principal question in this case is simply this: whether now the archbishop confirms judicially or ministerially? Upon that point I shall refer your lordships to some authorities, involving the construction of the statutes; assuming that my learned friend, Dr. *Addams*, has established the proposition, that, by the common law of this realm, the archbishop confirmed judicially.

Now, in *Caudrey's* case, 5 *Coke*, 5, the court observed, that a statute, being in the affirmative, does not abrogate or take away the jurisdiction ecclesiastical, unless words in the negative be added, as, "and not otherwise, or, in no other manner or form." Now those words do not occur in the statute 25 Henry 8, c. 20. In *Dwarris on Statutes*, p. 637, (*g*) citing 2nd Institute, 200, and 1st Institute 111, and 115, it is said, "A statute made in the affirmative, without any negative expressed or implied, does not take away the

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Powers of confirmation, &c., untouched by that stat.

Language of the letters patent.

Mischiefs intended to be rectified by the act.

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Principles to be applied, in construing the stat.

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Dwarris on Statutes 2nd and 1st Inst.

(*f*) *Supra*, p. 23.

(*g*) 1st edition; p. 473, 2nd edition.

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common law. It follows that it does not affect any prescriptions or customs clashing with it, which were before allowed; in other words, the common law continues to be construed as it was before the recognition by parliament." Again, my lords, in p. 696 (*h*), it is said, "If a statute make use of a word, the meaning of which is well known, and has a certain definite sense at the common law, the word shall be expounded and received in the same sense in which it is understood at the common law. Thus the term 'cottages' (which is used in stat. 31 Eliz. c. 7.), has the same signification there, as it had in the common law, and as is applied to it in Domesday Book." And so again, in p. 702, (*i*) it is said, "The words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and popular use." Now I submit, as a general principle, that commanding absolutely the performance of a judicial duty, does not render that duty ministerial. With respect to the forms of confirmation, it is admitted upon all hands, that these forms of confirmation have been in use nearly 300 years; and, during that period, there have been two or three hundred judicial causes or trials; and upon the very face of the records of those trials, the judicial powers of the archbishop to confirm are distinctly and unequivocally recognized; and they also give an explanation of the word *confirm*, in strict conformity with the language of the common law. I will refer your lordships to the language of the sentence in this case. "In the name of God, Amen. We, Sherrard Beaumont Burnaby, Doctor of Laws, Vicar General and Official Principal, lawfully constituted, of the Most Reverend Father in God, William, by Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, being hereunto sufficiently and lawfully authorized, and having heard, seen, understood, and discussed the merits and circumstances of a certain business of confirmation of an election made and celebrated, of the person of the Rev. R. D. Hampden, D. D., elected Bishop and Pastor of the Cathedral Church of Hereford, which is controverted and remains undetermined before us in judgment; and having considered the whole process had and done in the business of such confirmation, and having observed all and singular the matters and things that by law in this behalf ought to be observed; we have thought fit, and do thus think fit, to proceed to the giving our definitive sentence or final decree in this business, in manner following: Whereas by the acts enacted, deduced, alleged, propounded, exhibited, and proved before us, relating to such confirmation, we have amply found and do find that the said election was rightly and lawfully made and celebrated by the Dean and Chapter of the said Cathedral Church of Hereford, of the said Reverend the Bishop elect, a man both prudent and discreet, deservedly laudable for his life and conversation, of a free condition, born in lawful wedlock, of due age, and an ordained priest, and that there neither was nor is anything in the ecclesiastical laws that ought to obstruct or hinder his being confirmed by our authority Bishop of the said See: Therefore we, S. B. Burnaby, Doctor of Laws, the judge aforesaid, having weighed and considered the premises, and with the assistance of the learned in the law, do, by the authority

wherewith we are invested, confirm the aforesaid election made and celebrated of the person of the said Rev. R. D. Hampden, D. D., to the Bishoprick of Hereford. And we do, as far as is in our power and by law we may, supply all defects whatsoever in the said election, if any there happen to be. And we do commit unto the said Bishop elected and confirmed the care, government, and administration of the spirituals of the said Bishoprick of Hereford. And we do pronounce, decree, and order, by this our definitive sentence or final decree, which we make and publish in these presents, that the said bishop so elected and confirmed, or his lawful proctor for him, shall be inducted into the real, actual, and corporal possession of the said bishoprick, and of all its rights, dignities, honours, privileges, and appurtenances whatsoever, and be installed and enthroned by the Archdeacon of Canterbury, or his deputy, according to the laudable and approved manner and custom of the said cathedral church, not being contrary to the laws and statutes of this realm" (*j*). Now, my lords, upon this sentence being pronounced, the bishop becomes an ecclesiastical judge; and before the passing of the late act of parliament (*k*), he would instantly have become a spiritual peer; and yet this sentence is called, by the learned counsel on the other side, a mere sham. I will now refer your lordships to 17 *Viner's Abridgment*, title "*Prerogative of the King*;" O. c, p. 229. "If a sentence is given by the ordinary or other ecclesiastical judge, it is to be presumed by the judges of the common law, that it is according to the ecclesiastical law, and so they ought to allow it." And that was decided also in *Caudrey's case*, 5 *Coke*, 7. So that when we read this sentence by the aid of the principle involved in that case, what do we find? Why, that the lawful powers of the archbishop are distinctly and unequivocally recognized: we find a case in controversy; we find that evidence has been received; and that, upon it, judgment has been given.

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I will next refer your lordships to 3 *Salkeld*, p. 72, title "*Bishop*." That title treats of the creating of a bishop; and it says, "The manner of making a bishop, as well in case of translation, as new creation, is thus: when the see is vacant, the dean and chapter certify it to the king in chancery, and pray the king's licence to elect a bishop: thereupon the king grants his *Congé d'élire* such a person, naming him; and so they proceed to an election; and when that is done, they certify to the king, to the archbishop, and to the party selected; and then the king by his letters patents gives the royal assent, and commands the archbishop to confirm and consecrate him; whereupon the archbishop examines the election, and the party, and then confirms the election, and consecrates him." This is distinctly recognizing a judicial power in the archbishop to examine the election, and also to examine parties.

3 Salkeld, 72.
Manner of making a bishop.

Again in *Godolphin's Repertorium*, p. 26, (a work of authority in treating of the election and creation of bishops, and which contains a very succinct and able summary) it is said, "Then the proctor desires that all opposers may again be thrice publicly called; which done, and none appearing nor opposing, they are pronounced contumacious,

Godolphin's Repertorium.

(*j*) *Supra*, p. 79.

(*k*) 10 & 11 Vict. c. 108; "An Act for establishing the Bishoprick of

Manchester, and amending certain Acts relating to the Ecclesiastical Commissioners for England." See sect. 2.

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Gibson's
Codex.

What are
causes of de-
privation are
causes of re-
fusal.

Specot's case.

Watson's *Cler-
gyman's Law*.

The arch-
bishop's power
of depriving
bishops.

Bp. of St.
David's v.
Lucy.

Mode in which
the queen ex-
ercises her
ecclesiastical
supremacy.

Principle on
which the writ
of mandamus
issues.

Rex v. Justices
of Middlesex ;
Reg. v. Jus-
tices of W.
Riding of
Yorksh. ; Reg.
v. Justices of

and a decree made to proceed to sentence, by a schedule read and subscribed by the vicar general." Therefore *Godolphin*, who is a most able writer, distinctly recognizes the power of the archbishop to act judicially ; because he says, they proceed there to sentence, and all opposers are pronounced contumacious if none appear or oppose.

Again, my lords, in *Gibson's Codex*, p. 114, treating of the election and creation of bishops, it is stated, "Election is an incomplete act, which may be vacated many ways ; as, by the refusal of the person elected to accept ; by the refusal of the king to admit and confirm ; and by proofs of legal incapacity at the time of confirmation."—"Legal incapacity at the time of confirmation."—It has been said, my lords, that considerable mischief would arise, by holding that the archbishop acts judicially, instead of ministerially. But, my lords, there is no principle in ecclesiastical law better established than this, namely, that what are causes of deprivation are causes of refusal. For that position, I would mention *Specot's case*, 5 *Coke*, 58 ; and *Watson's Clergyman's Law*, 215. Applying that principle to the election of a bishop, the archbishop, if his duties be purely ministerial, may be obliged to-day to confirm, invest, and consecrate a man whom he may have the power to-morrow of depriving. Now, that appears to me, not only absurd, but in direct opposition to the principle I have stated. Suppose a man to be guilty of heresy, though the archbishop may be called upon to invest and consecrate him ; on the morrow, I say, he may be obliged to deprive him for that very offence : because the archbishop has the power of depriving bishops, by himself without any other court or assistance, if he think proper to exercise his power. *The Bishop of St. David's case*, 1 *Lord Raymond*, 541, is an authority for that position. "It was always admitted," says Chief Justice Holt, "that the archbishop had metropolitical jurisdiction, and the bishops swear canonical obedience to him ; and where there is a visitatorial power, there is no reason to question the power of deprivation ; for the same superiority, which gives him power to pass ecclesiastical censures upon the bishops, will give him power to deprive, it being only a different degree of offence. This appears upon the statutes 26 Henry 8, c. 1, and 1 Eliz. c. 1."

A great deal has been said about the Queen's prerogative being invaded ; but the true constitutional principle is this, that the queen exercises her ecclesiastical supremacy in her ecclesiastical courts, by ecclesiastical judges, upon principles precisely analogous to those upon which she exercises her temporal supremacy, in her temporal courts, by her temporal judges.

Now, my lords, with respect to the writ of mandamus, this general principle may be elicited from the cases, that the constant aim of this court, in issuing a mandamus, is to prevent injustice ; and the current of authorities establishes, that this court will always issue a writ of mandamus to a judge of an inferior court, when he refuses to give judgment in a case over which he has cognizance. My lords, a vast current of authorities upon that point may be cited ; *Rex v. The Justices of Middlesex*, 4 *Barnewall and Alderson*, p. 298 ; *The Queen v. The Justices of the West Riding of Yorkshire*, 10 *Adolphus and Ellis*, p. 687 ; *The Queen v. The Justices of Carnarvonshire*, 2 *Queen's Bench Reports*, 325 ; *Rex v. The Justices of Kent*, 14 *East*, 395 ; *The Queen*

v. *The Magistrates of Gort*, 1 *Jebb and Symes*, 388; *The Queen v. The Justices of Suffolk*, 4 *Jurist*, 390; *The Queen v. The Justices of Denbighshire*, 9 *Dowling's Practice Cases*, p. 509; *Rex v. Carter*, 4 *Term Reports*, 246; and *Rex v. The Surrey Justices*, 2 *Shower*, 74.

Now, my lords, I submit, from the sentence I have read to your lordships, that when the court were assembled in Bow Church, they were there for the purpose of performing a judicial duty; and, being there, it was their duty to hear any persons who presented themselves, in accordance with the practice of ecclesiastical courts. But, my lords, what are the facts of the case, as they are detailed in the affidavit? The court is opened; a proclamation is made, by order of the court, that all persons may come forward and appear, who have any objections against the confirmation of the election of the Bishop of Hereford, and that they shall be heard; upon which, three beneficed clergymen of the established church attend by their proctor and their counsel, with their charges reduced into writing,—appear and claim to be heard; but, upon their so doing, the judge of the court not only refused to hear them, but even refused to allow their appearance to be entered; and, after that, the court proceeded to the sentence, which I have read to your lordships, and from which, I again say, upon the face of it, it appears there is a case in litigation, that the court received evidence in that case, and that it afterwards proceeded to a final and definitive sentence.

Now I respectfully submit to your lordships, that this is a case in which there has been an absolute denial of justice: and it is very distinguishable from the cases which have been cited on the opposite side, in this respect; that, in those cases, or in some of them, an appearance was allowed, and there might have been an appeal; but, in this case, no appearance was allowed; and how could an appeal be made? What are you to appeal from? You cannot appeal from nothing: because we were not allowed even to enter an appearance; we were no parties; and therefore it is impossible we could appeal. It follows then that we can have no remedy, except it be by application to this court, for a writ of mandamus.

I would cite to your lordships one or two cases, in which the principles on which your lordships have issued writs of mandamus have been embodied. In the case of the *King v. The Mayor of Fowey*, which is reported in 2 *Barnewall and Cresswell*, 596, Chief Justice Best says: "It is said, that we have not the power to grant this mandamus. If this application had been made a century ago, it would not probably have been granted; for at that time a mandamus was held to lie only to compel the performance of a ministerial duty. But modern cases have gone much further; and a mandamus will now lie for the performance of any public duty." Again, my lords, in the same case, p. 598, the same judge says: "The true principle is, that this prerogative writ shall be granted in all cases where the justice of the country requires it should be granted. If justice does not require it to be granted, the granting of it would be an abuse of the power vested in the court. But if we see that justice will be defeated if it is not granted, we are not to be fettered in the exercise of our authority, by being told that in ancient times such a writ would not have been granted." In *Bagg's case*, 11 *Coke*, 98, it was resolved, that "to this Court of

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Carnarvonsh.; Rex v. Justices of Kent; Reg. v. Magistrates of Gort; Reg. v. Justices of Suffolk; Reg. v. Justices of Denbighsh.; Rex v. Carter; Rex v. Surrey Justices.

The proceedings in Bow Church were judicial.

No possibility of appeal in the present case.

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King's Bench belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to a breach of the peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done, but that it shall be (here) reformed or punished by due course of law."

Rex v. Barker.

My lords, there is only one other case with which I will trouble your lordships upon this head; and that is the case of the *King v. Barker*, 3 *Burrow*, 1267; in which Lord *Mansfield* says: "A mandamus is a prerogative writ, to the aid of which the subject is entitled, upon a proper case previously shown, to the satisfaction of the court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it shall be used. It was introduced to prevent disorders from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one. Within the last century, it has been liberally interposed for the benefit of the subject and advancement of justice. The value of the matter, or the degree of importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied."

Rex v. Bp. of
Lincoln.

This writ, my lords, has been granted to a visitor to receive and hear an appeal, in the case of *The King v. The Bishop of Lincoln*, 2 *Term Reports*, p. 338, note; "where a mandamus was prayed to the bishop as visitor of Lincoln College, Oxford, to compel him to receive, hear, and determine an appeal of Dr. Halifax, who complained of an undue election to the office of rector of that college, to which Mr. Horner had been admitted. The court determined that where, by the statutes of a college, a visitor is appointed, who is to interpret the statutes, and an appeal is lodged with him, the court will compel him to hear the parties, and form some judgment, though they will not oblige him to go into the merits; for it is sufficient, if he decide that the appeal came too late." Now, my lords, our complaint is, that, in this case, the archbishop's court has formed no judgment, because the parties never were before it; it would not allow the parties to appear. So, the same principle is recognized in the case of *The King v. The Bishop of Ely*, 5 *Term Reports*, p. 477. "When a visitor refuses to receive and hear an appeal, this court will compel him to exercise his visitatorial power: but we have no authority to compel him to form a particular judgment on the merits."

Rex v. Bp. of
Ely.

Penalty no
obstacle to the
issuing of a
mandamus.
Rex v. Everet.

My lords, it has been said, that this court will never issue a mandamus, if a party, by obeying it, will incur a penalty. Now, in the case of *The King v. Everet*, *cases tempore Hardwicke*, p. 261, *Hardwicke*, Chief Justice, says: "As to the penalty, there is nothing in it; for whenever an act of parliament directs something to be done, the court will enforce the doing of it by mandamus; so upon the act of parliament to oblige mayors of corporations to attend at the assemblies, we always grant a mandamus, notwithstanding the penalty."

In doubtful

My lords, there is another principle which the court, from the

earliest period to the present, has always acted upon, in cases of mandamus; viz., that if the court have any doubts upon the facts or the law, the rule *nisi* is to be made absolute, in order that such doubts may be determined, upon the return. In the case of Sir Gilbert Heathcote, in 10 *Modern Reports*, 48, (which was that of a writ to the Lord Mayor of London, to return such and such persons by name to the Court of Aldermen, as the persons chosen by the wardmote of Broad-street, or to show cause why they would not) *Powis*, Justice, observed: "Many are the instances where this court have granted mandamuses, in doubtful cases; as, to the treasurer of the *New River* water (1 *Sid.* 169), to fellow of a college (1 *Lev.* 23). All cases of mandamuses are granted *hæsitante curiâ* (2 *Lev.* 14); and the ground they went upon was this, that it would be better spoken to upon the return. Now, if this court has acted thus, in matters of an inferior nature, à *fortiori*, will it do so in a case of this importance." And I have no hesitation in asserting that, ever since that case, where, in any corporation, railway, or other case whatever, any one or two of your lordships have had a doubt, either upon the facts or the law, the rule *nisi* has been made absolute, in order to have the question discussed upon the return.

It has also been asserted that the Church Discipline Act (I) is a bar to this mandamus. The Church Discipline Act does not apply.

Lord DENMAN. We need not hear you upon that. This proceeding, at all events, is not merely by way of punishment.

Mr. Stephens. Then, I submit to your lordships, we have shown, on the face of this affidavit, that here is a court of justice, and that we have been denied justice. And, upon the authority of the cases I have cited, I submit that this rule ought to be made absolute although, perhaps, some of your lordships may entertain doubts, in order that upon the return, the question may be ultimately decided under stat. 6 & 7 Vict. c. 67 (m), if either party choose to pursue it to that extent.

Mr. Peacock. My lords, it is not my intention to trouble your lordships with any argument upon the canon law; because my learned friend, Mr. Badeley, is much better acquainted with that branch of the law than I am; and therefore I shall not at present enter into any argument upon that subject. But I will assume, for the present purpose, that, according to the canon law, before the confirmation of a bishop took place, parties were at liberty to come in, and oppose, and show any objection they might have to the confirmation. And the question is, whether that law has been altered by the statute of the 25th of Henry 8th, c. 20, and whether it is now compulsory on the archbishop, in all cases, and under all circumstances, to confirm and consecrate a bishop, who has been duly elected by the dean and chapter.

Now, my lords, I apprehend, that depends upon the true con-

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cases, usual to make the rule *nisi* absolute.

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The right of opposition, according to the canon law, not abrogated by stat. 25 Hen. 8, c. 20.

Meaning of that stat.

(I) 3 & 4 Vict. c. 86; *supra*, p. 154, n.

(m) "An Act to enable parties to

sue out and prosecute Writs of Error in certain cases upon the proceedings on Writs of Mandamus."

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struction of the 7th section, which says, that if any archbishop or bishop "shall refuse, and do not confirm, invest, and consecrate, with all due circumstance as is aforesaid, every such person as shall be so elected, nominate, or presented, and to them signified as is above mentioned, within twenty days next after the king's letters patents of such signification or presentation shall come to their hands; or else, if any of them, or any other person or persons, admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of due execution of this act; that then every prior or particular person of his convent, and every dean and particular person of the chapter, and every archbishop and bishop, and all other persons, so offending and doing contrary to this act, or any part thereof, and their aiders, counsellors, and abettors, shall run in the dangers, pains, and penalties of the statute of the provision and *præmunire*, made in the five and twentieth year of the reign of King Edward the Third." Now, my lords, does that mean, if they shall refuse to confirm and consecrate according to law (that is to say, wilfully and corruptly refuse), or, if they shall refuse to confirm and consecrate, where there is a full and good objection to the confirmation and consecration?

Stat. 25 Hen.
8, c. 19.

It will be necessary that I should call your lordships' attention to the previous chapter, 19; because it has been said that, the canon law having been introduced into this country, no portion of it became the law of this country, where it interfered with the common or statute law, or with the prerogative of the crown. And I understand it to be argued on the other side, that if the canon law, which allowed opposers to come in, were introduced, it would be in violation of the prerogative of the crown. But your lordships will observe that, at the time when that statute of Henry 8, c. 19, was passed, it was not the prerogative of the crown at all to compel the archbishop to confirm; for it was not until the 20th chapter was passed, that the crown had the power to command the archbishop to confirm. By c. 19, s. 7, it is enacted, "That such canons, constitutions, ordinances, and synodals provincial, being already made, which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the king's prerogative royal, shall now still be used and executed as they were afore the making of this act, till such time as they be viewed, searched, or otherwise ordered and determined, by the said two and thirty persons, or the more part of them, according to the tenor, form, and effect of this present act." Now, my lords, I say, that if you are satisfied that the canon law allowed opposition to be made to the confirmation of a bishop, it was not, at this time, contrary to the prerogative of the crown that the archbishop should hear opposers. Then the 20th chapter was passed; and the question is, whether that statute means that the archbishop should confirm according to the canon law, or that he must confirm at all events. My lords, it is clear that whatever the law is as to confirmation, must also, I apprehend, be the law as to consecration; because it is enacted in the same clause, that if the archbishop shall refuse

to confirm or consecrate, he shall be subject to the penalties of *præmunire*. And can that statute intend to compel the archbishop to consecrate a bishop, under any circumstances whatever, although he may know, or although it may be proved to him, that the person so presented for consecration is not a person worthy to be consecrated? My lords, I am not alluding now to the objection in this particular case; because I apprehend, whether it be an objection or not, is a question for the decision of the archbishop; and the only question that is now before your lordships is this:—ought the opposers to be heard? and, if they ought to be heard, will a mandamus go to the archbishop to compel him to hear them; he having refused to hear them, not deciding upon the canon law, but upon a misconstruction, as I apprehend, of the statute of Henry 8?

My lords, the case has been supposed of a person being elected and presented to an archbishop to be consecrated, who is not of the age of thirty years. My learned friend on the other side rather assumed that the signification of that election, and the mandate of the queen to the archbishop, would be tantamount to a dispensation by the Pope of anything that was requisite; and my learned friend contended, that every power which had been vested in the Pope was transferred to the kings of this country, and that, under the head of supremacy, the king of this country had the same powers as the Pope (*m*). Now, I apprehend, it is perfectly clear that the king has not the same power as the Pope. He is the head of the church: no person is over him. But he has not the same power as the Pope: the king cannot consecrate a bishop, nor ordain a priest.

Mr. Justice ERLE. The same power to dispense.

Mr. Peacock. I apprehend that the king could not dispense with the age of a bishop; it being enacted, that a bishop shall be of the age of thirty. It is remarkable, that the direction as to the age of a bishop follows the age of a deacon, which is stated to be twenty-three, "unless he have a faculty," that is, a dispensation. But the bishop must be thirty, the words "unless he have a faculty" being left out in his case.

Mr. Justice COLERIDGE. The question is, could the king dispense with the canon law? Both the statutes indirectly, you know, settle the age of a bishop, that is, taking the Common Prayer as part of the common law. The statutes of Edward 6, and the other statutes (*n*), are subsequent to the statute of Henry 8. Was there any act of parliament of Henry 8 that fixed the bishop's age?

Mr. Peacock. No, my lord. It being settled that no dispensation would allow a person to be elected, confirmed, and consecrated, under the age of thirty, the question would be, whether the archbishop would be bound to confirm a bishop, if he discovered that the person was not of the age required by the canon law. I understand, it was put, that the mandate of the queen was tantamount to a dispensation; but, I apprehend, the crown could not dispense, in the case of a bishop. In the preface to "*The Form and Manner of*

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Case supposed, of a person presented for confirmation under canonical age.

The crown's supremacy does not imply powers of dispensation commensurate with those formerly possessed by the Pope.

(*m*) *Supra*, p. 170.

(*n*) 3 & 4 Edw. 6, c. 10; 5 & 6 Edw.

6, c. 1; 8 Eliz. c. 1; and 13 & 14 Car.

2, c. 4.

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making, ordaining, and consecrating Bishops, Priests, and Deacons," it is stated that "none shall be admitted a Deacon, except he be twenty-three years of age, unless he have a faculty. And every man who is to be admitted a Priest, shall be full four and twenty years old. And every man which is to be ordained or consecrated Bishop, shall be full thirty years of age." The case of the deacon is the only case in which faculty is mentioned. Having mentioned a faculty with reference to a deacon, I apprehend the true construction of this enactment is, that no faculty would entitle a person to be admitted a priest, or consecrated a bishop, under the prescribed age.

Mr. Justice COLERIDGE. That faculty of dispensation is not in the crown.

Mr. Peacock. No: in the archbishop. A faculty or dispensation is allowed for persons of extraordinary knowledge or abilities, enabling them to be ordained deacons at an earlier period than the Book of Common Prayer specifies. This faculty may be obtained from the Archbishop of Canterbury. Now, my lords, I will suppose that after a person shall have been elected a bishop, it should be discovered that he is not of the age of thirty years; would the archbishop, knowing that, be bound to confirm and consecrate him a bishop? Again, my lords, suppose that letters missive should be sent by the crown to the dean and chapter; and, after the election by the dean and chapter, the person so elected should be found guilty of some crime, of a crime for which, beyond all doubt, the archbishop would have the power to deprive him; is it to be said that the archbishop, knowing of that crime, or having the conviction of that individual, before a court of competent jurisdiction, produced before him (I will suppose the crime of perjury, or any other crime)—is it to be said that the archbishop would be bound to consecrate him, although he should know from the conviction that the party has been guilty of the crime, or although he should have seen him, in his own presence, commit it? In the consecration of bishops, one question is, "Will you be faithful in ordaining, sending, or laying hands upon others?" The archbishop must have promised to be faithful in laying hands upon others; and having made that promise, is he to lay hands (which he must do in the consecration of a bishop) upon a person, whom he shall actually have seen commit a crime, or known to have committed a crime, by a conviction being produced before him, or else be subject to the penalties of *præmunire*? I say, it is not consistent with reason, so to construe the statute; and that the real meaning of it is, that the archbishop shall consecrate the person presented, if there is no valid objection to his consecration.

My learned friend, Dr. Bayford, has said, that there is a profound darkness as to what was the canon law upon this subject (*o*). I say the more profound the darkness, the more necessary it is for us to obtain as much light upon the subject as we can. And that which throws light upon the subject, is the practice, which has been followed from the time of Elizabeth to the present time, by which

opposers have been cited to come in, and show to the archbishop objections why the party should not be confirmed. My lords, suppose an opposer to come and say, I produce the judgment of a court of criminal jurisdiction, in which this gentleman has been convicted of felony; is the archbishop bound to hear him, or is he not? I should say, he ought to be bound to hear him. And if the archbishop decides that, according to the construction of the statute, he is precluded from doing so, your lordships would see that he has come to an erroneous conclusion, not upon the canon law, (for that would prevent his confirming such a person,) but upon the act of parliament, by deciding that the act is imperative upon him, and that he is bound to confirm at all events. Now that is what has taken place in the present case; it having been decided (not upon the canon law) that no objection to the confirmation of a bishop is to be listened to; but the reason advanced is, "I am precluded by the statute: I have no right to allow you to appear and show me any objection you may have to the confirmation of this gentleman." It is sworn distinctly in the affidavit by the proctor, that he appeared; "that he had objections in writing then in his possession, and that whilst this deponent was in the act of presenting such objections, which were in the form of a libel or plea, and were duly signed by advocates, as is usual in such cases, the said Vicar General said to this deponent, 'We are acting under a mandate from the crown, issued pursuant to the provisions of the statute of the 25 Hen. 8, c. 20. And we conceive ourselves bound to confirm, without suffering any opposition,' or words to that effect. And this deponent then said, in answer to the said inquiry of the said Vicar General, 'Right Worshipful, I bring in a libel,' or words to that effect." And then he says, that "Dr. *Lushington*, one of the assessors of the said Vicar General, said to this deponent, 'No, you will not: you are not permitted to appear; and, Mr. *Townsend*, you know perfectly well, as an ecclesiastical practitioner, that you are not able to bring in a libel until you are permitted to appear.'" So that the parties are precluded from appearing. And again, it is stated that, after citing these parties, and having decided that they were contumacious for not coming in and opposing, (when the court had refused to allow them to appear or oppose), they were cited a second time, and a second time decided to be contumacious, because they would not come in and appear. And then the definitive sentence was pronounced; and it is stated in the affidavit, that it was "decided that they could not hear any objections to the confirmation of the said election, and that they were precluded, by the said statute, from allowing any such objections to be entertained; the said Vicar General delivering his judgment to the effect following, that is to say, he was of opinion that the court was bound to proceed to the confirmation of the election of Dr. Hampden to the bishoprick of Hereford, under the provisions of the statute of the 25th year of King Henry the Eighth, which clearly extended to the present case, and by which, if he should commit or suffer any let or hindrance to such confirmation, he should become liable to the penalties of *præmunire*; that the act itself prescribed no mode of proceeding in the performance of the duty enjoined, nor referred to any; and that the

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attaches only
on groundless
refusal to con-
firm, &c.

Supposition of
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openly express-
ed at consecra-
tion.

The like at
confirmation.

Mode of pro-
ceeding upon
præmunire.

Bac. Abr.
Stat. 28 Hen.
8, c. 16.

court was bound by the statute law of the realm, which afforded it no alternative, but that of confirming the election, which was certified to have been made by the dean and chapter of Hereford, or subject themselves to the penalties of *præmunire*"(p). It was decided, not upon the ground that the objection made was such as would not warrant them in refusing to confirm, but that the statute precluded them from allowing any one to come in and be heard, and precluded them from entertaining any opposition or refusing to confirm upon any ground whatever.

Now, my lords, I apprehend that the words of the statute of Henry 8, which say that the archbishop is to be subject to *præmunire* if he refuse to consecrate, must mean, if there be no legal or valid objection. The archbishop, in the course of consecration, is required to ask certain questions, which, by the form of consecration, the person to be consecrated is to answer in a particular way: suppose, when he came to the question, "Are you persuaded that the Holy Scriptures contain sufficiently all doctrine required of necessity for eternal salvation through faith in Jesus Christ?" the person proposed to be consecrated were to say, "I am not;" and the archbishop were to refuse to consecrate him; is the archbishop subject to *præmunire*? or would he not refer, for his justification, to the fact, that when he was proceeding to consecrate, upon asking certain questions of the person proposed to be consecrated, that person told him, he had no faith in the Scriptures? Suppose such a case as that, would there be no answer to a *præmunire*?

Again, if there would be an answer to a *præmunire* for not consecrating in such a case, suppose the bishop actually came before the archbishop, at the time of *confirmation*, and were to state publicly, "I do not believe the Scriptures," would the archbishop be bound to confirm him, or be subject to a *præmunire*? I apprehend not; and that there is good reason for the practice, which has prevailed, of calling on opposers who may know something against the character of the person elected, and for allowing them to be heard. My only ground of argument at present is this, that these opposers have a right to be heard, and that they were refused a hearing upon a misapprehension of the statute.

Mr. Justice COLERIDGE. Have you made searches for any entries of *præmunire*?

Mr. Peacock. I have found one or two. In *Bacon's Abridgment*, there is this passage: "And by 28 Hen. 8, c. 16, (by which all bulls, briefs, &c., heretofore obtained from Rome are made void (q) whoever shall use, allege, or plead the same in any court, unless they

(p) *Supra*, pp. 87, 88.

(q) Sect. 2 enacts, "that all bulls, breves, faculties, and dispensations, of what names, natures, or qualities soever they be of, heretofore had or obtained of the Bishop of Rome, or any of his predecessors, or by the authority of the see of Rome, by or to any subjects, resiants, or bodies politic or corporate, of or in this realm, or of or in any other the king's dominions,

shall from henceforth be clearly void and of no value, force, strength, nor virtue; and shall never hereafter be used, admitted, allowed, pleaded, or alleged, in any places or courts of this realm, or of any other the king's dominions, upon the pains contained in the Statute of Provision and *Præmunire*, made in the sixteenth year of the reign of King Richard the Second."

are confirmed by that statute, or afterwards by the king, shall incur the like penalty." That is, if they shall ever plead a bull which has not been confirmed by the statute. There is a note: "Yet it hath been holden that the alleging an ancient bull in order to induce another principal matter whereon to ground a title, without claiming anything from the bull itself, is not within this statute." There the words are general. If you allege any bull, you shall be subject to *præmunire*; yet alleging a bull, by way of inducement to another title, does not subject you to *præmunire*.

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Mr. Justice PATTESON. Where are you citing from?

Mr. Peacock. I was reading from *Bacon's Abridgment*, title, *Præmunire*, letter A. The passage I last read is in the margin. And I use it, to show that, though the words of the statute are general, still a reasonable construction is put upon those words, and that they are not carried out to the very letter.

The *Attorney General*. Your lordships asked for precedents. Your lordships are aware that the same words are introduced into the Bubble Act of George 1 (*r*). In cases falling under that act, the indictment was in the ordinary form for enforcing the Bubble Act; and the punishment as in the case of a *præmunire* likewise attached. There is the case of *The King v. Cawood* (*s*) upon that.

Bubble Act.

Rex v.
Cawood.
Stat. 16 Ric.
2, c. 5.

Mr. Justice COLERIDGE. By the first statute of *præmunire* (*t*), the proceedings were in the court of the king in council, not in the king's bench. You may see them in *Bacon's Abridgment*, and in the Year Books; but I do not know what the entries were.

The *Attorney General*. There is one writ in the old *Natura Brevium*.

F. N. B.

The *Solicitor General*. There is *Lalor's case* in the State Trials (*u*). There, I think, the proceedings are set out. It comes from *Davies's Reports*.

Lalor's case.

Mr. Peacock. It appears that, upon *præmunire*, there is an indictment; and then the party pleads to the indictment.

Mr. Justice COLERIDGE. The plea of "not guilty" would let in the general defence, of course.

Mr. Peacock. "Not guilty" lets in the whole of the defence. There is a case in *Dyer*, 363 a, referred to in *Comyns's Digest*, title *Præmunire*, C., where it was held that an indictment upon *præmunire* was bad for not following the words of the statute. It was an indictment upon *præmunire* under the statute of 1 Elizabeth, c. 1. The indictment omitted the precise words, and merely said, "contrary to the form of the statute;" and it was held that the indictment was bad, and not cured by the allegation, "contrary to the form of the statute." I merely use that, to show, that upon a *præmunire* the

Com. Dig.
Anon. Dyer,
363 a.

(*r*) 6 Geo. 1, c. 18. The 19th sect. enacts, that all the undertakings therein referred to shall be deemed public nuisances; and all offenders therein shall be liable to penalties accordingly; "and moreover shall incur and sustain any further pains, penalties, and forfeitures, as were or-

dained and provided by the Statute of Provision and *Præmunire*, made in the sixteenth year of the reign of King Richard the Second."

(*s*) 2 Lord Raym. 1361.

(*t*) 16 Ric. 2, c. 5.

(*u*) Vol. 2, p. 533, 8vo. ed.

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Upon *præmunire* for declining to consecrate, a canonical objection to the person elected a good defence.

Fletcher v.
Calthrop.

Rex v.
Corden.

course seems to be, to proceed by indictment in the ordinary way, alleging the offence to bring it within the statute.

I apprehend, therefore, that upon an indictment against the archbishop for refusing to consecrate, it must be shown that he refused to consecrate without some lawful excuse. And then the archbishop might show, in answer to such an indictment, that when he came to consecrate, he asked the person presented to him for consecration, whether he believed the Holy Scriptures, and that such person had given him the answer that he did not. That, I apprehend, would be an answer to a *præmunire*, by showing that the archbishop was acting lawfully, in refusing to consecrate.

It may be said that particular answers are given in the form of the consecration. But that form did not exist at the time when the statute of Henry 8 was passed. Therefore the archbishop must then have been allowed, I apprehend, to ask such questions as, according to the canon law, he ought to ask. And if he had known or seen the party commit any offence, he would have been justified in refusing to consecrate him; and, if justified in refusing to consecrate, he would also be justified in refusing to confirm.

In the case of *Fletcher v. Calthrop*, in 6 *Queen's Bench Reports*, p. 880, it was held, that even upon a summary conviction, it is not sufficient to follow the words of the statute, unless the words of the statute necessarily create the offence. "Stat. 9 Geo. 4, c. 69, s. 1, gives a summary conviction, if any person *shall by night unlawfully enter or be in any land, whether open or enclosed, with any gun, &c., for the purpose of taking or destroying game*. A conviction set forth that C. did, by night, *unlawfully enter certain enclosed land, with a net for the purpose of taking game, to wit, partridges and pheasants, contrary to the form, &c.* Held bad, for not stating the intent to be to take game *there*." Now the statute did not say, that the offence was being there "with the intent to take game *there*," but, if he was there with the intention of destroying game; yet the court, upon the construction of that statute, said, it must be "with the intent to take game *there*;" and though the words of the statute were followed, in stating he was there for the purpose of destroying game, the indictment did not say he was there for the purpose of destroying game *there*; and it was held bad. And that was by introducing into the statute a reasonable construction which was not in the very words of the statute. In delivering judgment in that case, the case of *The King v. Corden*, in 4 *Burrow*, p. 2279, is referred to: and Lord Denman, in delivering judgment, says, that case "is a distinct and pointed authority for the proposition that the words of the act are not universally all that must appear on a conviction. There the charge was for fishing in a pond. It was held naught, for want of negation of the owner's consent. The same argument which is here resorted to would have supplied that defect, and was pressed on the court; who said, however, 'The offence intended in this conviction is fishing in the fishery of Mr. Hayne, being private property. But all this might be done, for aught that appears upon this conviction, with the consent of the owner. The fact ought to appear, so that the court may be able to judge whether the conviction be agreeable to law.

If the owner had been the complainer, that would have shown his dissent: but this conviction is upon the complaint of *Martha Buxton*; and it does not appear that the defendant has been guilty of fishing in any water being private property, without the consent of the owner." There, it was necessary, to make it part of the offence, that the conviction should show that the act was done without the consent of the owner. It is not every thing that falls within the words of a statute that necessarily amounts to an offence. There is a reasonable construction to be put upon the words of a statute; and, in drawing an indictment, or a conviction upon a statute, it is not sufficient to use the very words of the statute: it is not sufficient to say the offence was committed against the form of the statute; but you must show that the offence came within the meaning of the statute, in the way in which the court, putting a reasonable construction upon the words, would interpret the statute. I say then, that, putting a reasonable interpretation upon the statute of Henry 8, the real meaning of that statute is, if the archbishop shall refuse to confirm, or refuse to consecrate, without some lawful or valid excuse.

It appears by that statute, that consecration is required, even though the dean and chapter refuse to elect. If the archbishop shall refuse to confirm, or refuse to consecrate, there is no power given to the crown of doing an act which would be tantamount to confirmation or consecration. If the dean and chapter refuse to elect, when the crown orders them, if they do not elect within a given time, the crown may nominate; and the crown's nomination is then tantamount to election. But if the archbishop, having confirmed, refuses to consecrate, there is no power given to the crown to do any act which is tantamount to confirmation or consecration. Which shows that the acts of confirmation and consecration are acts in which the archbishop is to exercise some judgment and control, with respect to the person who is presented to him either for confirmation or consecration.

My lords, the commission, in this case, has been alluded to; and I find that it is not to confirm at all events, but, as far as I caught the words of it—perhaps the *Attorney General* will allow me to read the words of the commission—it is not a commission to confirm at all events, but it is in this form: "We are commanded (among other things) to confirm the election of the person of the Reverend Renn Dickson Hampden, D. D., to be bishop and pastor of the Cathedral Church of Hereford, within our province of Canterbury: We, therefore, being desirous, with that duty that becomes us, to fulfil and obey her Majesty's commands, do, by these presents, give and grant our commission to you,"—and so on,—“any or either of you, full power and authority for us, and in our stead, to approve and confirm the election of the person of the said Renn Dickson Hampden, made and solemnized, and the election itself, and the person so elected, according to the direction of the laws and statutes of this realm of England, and according to the tenor, form, and effect of her Majesty's said mandate made and directed to us in this behalf, as aforesaid, so far as it shall appear to you, any or either of you, that the said election was and is rightfully and lawfully made, to approve and allow of, and rightfully and lawfully to supply all defects (if any shall have happened), and all and singular other thing and things,

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Mode of construing the penal clause in stat. 25 Hen. 8, c. 20.

Indication of intention in the act to allow the archbishop some judgment respecting the fitness of the person.

Form of the commission not peremptory, to confirm at all events.

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Church Disci-
pline Act
inapplicable.

No possibility
of appeal, in the
present case.

The present
case distin-
guishable from
those in which
a mandamus
was refused.

act and acts, which in this behalf shall be necessary or in anywise requisite to do, exercise, and perform" (v). Therefore it does not command him at all events to confirm.

Some allusion has been made to the Church Discipline Act (w); but, I apprehend, it cannot at all affect the case; because this matter was not brought forward by way of punishment.

My lords, there are several cases which have been cited to your lordships, to show that a mandamus is not a proper remedy, but that the proper remedy in this case is by appeal. Now, I apprehend, it is impossible to appeal in this case; because a party cannot appeal, until he has been allowed to appear. In this case, the refusal is not a decision upon a matter which is produced against Dr. Hampden; but the decision is this,—“You are not entitled to appear at all: You are not entitled to come in and oppose; and, whatever your objection may be, whatever you may propose against him, we will not allow you to be heard at all.” Can a party appeal against that? It is not a decision upon the case. It is not a decision, that what you have brought against Dr. Hampden is not a proper ground for our refusal to confirm him. But it is,—“We will not allow you to appear at all.” Therefore, there are no parties to appeal to any other court. Suppose they had been allowed to appear, and a decision had taken place upon the merits, and the archbishop had decided,—“What you propose in this case, is not a sufficient ground for our refusal to confirm; then possibly there might have been an appeal to the privy council, which is now substituted for the court of delegates (x); because the Queen, I apprehend, upon any decision of an ecclesiastical court, might, by virtue of her prerogative, have granted a commission of delegacy, and subsequently, if necessary, a commission of review. But the case is this, not that you have heard and decided erroneously, but that you refused to hear.

My lords, many, indeed I believe, most of those cases, are cases where the court has refused a mandamus upon the ground that the proceedings furnished subject-matter for appeal. Those cases decide that where the courts do hear and determine, and determine wrong, this court will not enter upon the question by way of appeal; because this court is not a court of appeal from the ecclesiastical courts. But this court will compel the ecclesiastical courts to hear. It will not compel them to decide in any particular way; and, if they decide wrong, it cannot interfere with them; but it will compel them to hear; and that is all we ask. We ask that the opposers shall be allowed to come in and state their objections in due form of law; not that your lordships will command the archbishop to act or to decide upon these objections, or this opposition, in any particular way, but merely to hear those objections, and decided upon them. Then, if he does that, this court has no further power, though he should decide wrong; because then he would be deciding upon the canon law. Of course, if there is no appeal, his would be the last court, and his decision would be final. If there is a court of appeal, the cause could be carried, by way of appeal, to that court. All we ask is this: Hear the case; and, though it is a matter of eccle-

(v) *Supra*, p. 22, n.

(w) 3 & 4 Vict. c. 86; *supra*, p. 154.

(x) By 2 & 3 Wm. 4, c. 92.

siastical jurisdiction, we ask this court to command the archbishop to hear it.

My lords, in the 1st volume of Lord *Raymond*, p. 361, there is the case of *The King v. Sir Richard Raines*. There it was held, that "a mandamus lies to compel the ordinary to grant the probate of a will to an executor. The ordinary cannot refuse probate because the executor is insolvent and will not give caution." Now no one can say, that if a will be produced to an ecclesiastical court, and the court hear the question, and decide that it is not to be admitted to probate, there is any ground of appeal to this court. No one can contend for that; because the ecclesiastical court has the sole cognizance of those matters, and this court is bound by the decision of the ecclesiastical courts. The ecclesiastical court, so far as personal property is concerned, decides as to the execution of the will, the competency of the party to make a will, and everything that is necessary to constitute the paper a will; and if that court decide that it is not a will, however erroneous its decision may be, there is no appeal to this court. But if the ecclesiastical court says this, We will not allow you to propound that paper at all; we will not hear you upon the subject: you produce to us a paper, and wish to propound it as a will; but we will not hear you;—I apprehend this court has the power to compel the ecclesiastical court to allow the party to propound the paper and to decide upon it, though not to decide in any particular way. In that case, the ecclesiastical court refused probate, because the executor was insolvent and would not give caution; but the court granted a mandamus. *Holt*, Chief Justice, says, "Wills and testaments are of ecclesiastical cognizance, not by force of the civil or canon laws (for they bind no further here, than as they have been received here) but by the law of the land. Then if the ecclesiastical courts proceed to enlarge the power of the judge, contrary to that which the common law allows, the King's Bench will prevent all sorts of encroachments. As, if an executor be sued in the ecclesiastical courts to make distribution, he not being residuary legatee; though that were allowed by the canon law, yet the King's Bench would grant a prohibition to stay any such suit; for all suits for distribution were prohibited by the King's Bench, until the 22 and 23 Car. 2, c. 10, made them lawful. Dr. *Waller* has not quoted any canon law, that the ordinary in such case ought to take caution; and the common law will not permit him to exact security for the insolvency of the executor. For suppose in this case (as the fact is) the executor will not give security, and yet will not renounce the executorship; the ordinary cannot compel him to give security." Now, my lords, that case shows, that if an ecclesiastical court decide upon a matter of law, which it has no power to decide upon, and decide wrongfully, this court will grant a mandamus to compel him to exercise its proper jurisdiction. So, I apprehend, a mandamus will lie to compel it to hear a case upon the propounding of a paper as a will: this court will compel it to hear parties upon the question, whether the paper propounded be a will or not. So, if there be no will, this court will compel the ecclesiastical court to proceed to grant administration; but this court cannot say there is no will. It is upon an affidavit, showing that the ecclesiastical court

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teven.

declines the exercise of its proper jurisdiction, and to decide whether there is a will or not, that this court will compel it to act. But if, upon a paper being produced, the ecclesiastical court were to decide ever so erroneously, pronouncing that such paper was or was not a will, this court would not interfere: all that it will command the ecclesiastical court to do, is to hear the case; and that is all we ask in the present instance.

My lords, the case of *The Bishop of St. David's v. Lucy* (y), which has been so often referred to, is a case of prohibition; and that was a case in which this court would not prohibit the ecclesiastical court, which had declined receiving some allegations, from proceeding. But there the party was before the court: he was a party to the suit, and might have appealed, if the ecclesiastical court had determined incorrectly. The ecclesiastical court heard him, and decided against him; and this court would not interfere. But if they had refused to hear him, then the jurisdiction of this court would have arisen, to compel them to hear.

Again, the case of *Mr. Carmichael Smyth* was cited from 3 *Adolphus and Ellis* (z). That was a case in which the matter was subject-matter for appeal, and not a subject-matter for a mandamus here.

LORD DENMAN. That is not so, I think. It was not a case for appeal. It was from the Judicial Committee of the Privy Council.

Mr. Peacock. It was before a court of appeal.

Mr. Waddington. There the court said, there was no appeal, and there was no remedy at all.

Mr. Peacock. Because it was the decision of a supreme court, having competent jurisdiction. In all these cases, I think your lordships will find, where a mandamus has been refused, the refusal has been upon the ground that, a court of competent jurisdiction having decided, this court cannot be made a court of appeal, and cannot compel the other court to hear the case again, or to decide contrary to what it had originally decided. But where the tribunal refuses to hear at all, this court grants a mandamus.

My lords, as to the case of *The Queen v. The Justices of Kesteven*, in the 3rd volume of the *Queen's Bench Reports*, 810, if the Sessions decide a question of fact, this court will not sit, by way of a court of appeal, upon their decision; but if they determine a question of law erroneously, this court will compel them.

Mr. Justice COLERIDGE. You cannot state that so generally; can you?

The Attorney General. There is no appeal.

Mr. Justice COLERIDGE. If they refuse to hear a party upon a preliminary point, or decide that point wrongly, then the court will compel them.

Mr. Peacock. It was upon a preliminary point.

Mr. Justice PATTESON. The cases where the court has granted a mandamus, have been generally, I think, where a court or magistrate has refused to hear an applicant. Have you any direct authority, in any case, where the applicant has been heard, and the court or magistrate has refused to hear the other side, in which a writ of mandamus has been granted?

(y) 1 Ld. Raym. 539; *supra*, 150, 209, 254.

(z) P. 719. *Supra*, 160, 259.

Mr. *Peacock*. I am not aware of any such decision. I was putting this case upon the ground, that this is not matter of appeal, but a matter in which the party asks the court that he may be allowed to be heard. It is a mandamus to hear, and not a mandamus to decide in any particular way. I shall be unnecessarily occupying your lordships' time, if I go further into the matter. Having called your lordships' attention to that distinction, I think you will find that it applies to all the cases which have been cited on the other side, and that a writ of mandamus is the proper remedy.

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Mr. Peacock's argument.

Mr. *Badeley*. My lords, after the long discussion which this case has undergone, I am unwilling to occupy the time of the court; but the case is one of so much importance, and one in which an interest is felt so extensively and so very deeply, that I should not be doing my duty, either to the court itself, or to those whom I have the honour to represent, if I did not offer some observations to your lordships.

Mr. Badeley's argument.

I apprehend that, upon the question of jurisdiction, and the right of this court to issue a mandamus, the present case must be governed by the same rules which apply to other cases of inferior tribunals; and that there can be no doubt, that if an inferior court refuses to exercise its jurisdiction, this court will interfere by mandamus to compel it. And, with reference to the question which has just been put by the learned judge, whether a case has been found in which this court has interfered by mandamus, where one party had been turned away without having been heard at all, and judgment given in favour of the other, I can only say, I have not found any such case: and perhaps the reason may be, that, in this country, where justice is so well administered, a case of such oppression, and such injustice, has not occurred. This perhaps may account for no precedent being in existence. But I think it is perfectly clear, if a party goes before a court, and claims any benefit, or any right, for conferring or establishing which the court is actually constituted, he is entitled, on the refusal of such court to perform its duty, to come here and enforce the remedy which the law gives him; and that there can be no doubt that to any such court, be it ecclesiastical or be it temporal, the jurisdiction of the Queen's Bench will extend.

The jurisdiction of the Q. B. by mandamus extends to the present case.

My lords, the principle is the same precisely as in those cases which have been cited by my learned friend, Mr. *Stephens*, with respect to visitors (*a*). No doubt this court will interfere to compel a visitor to hear. It will not compel a visitor to give his judgment in any particular manner, but it will compel him to give some judgment one way or the other, leaving it of course to his own discretion to decide according to his duty.

So, by other authorities, this is laid down in the strongest possible manner. In *Comyns's Digest*, tit. "*Prerogative*," D. 9, citing 2 *Rolle's Abridgment*, 234, it is affirmed, that "by virtue of his prerogative, the king may by mandamus command the ecclesiastical judge to do right." The king exercises his prerogative through this court, and thus compels the ecclesiastical judge to do his duty. We claim here

Com. Dig. Rol. Abr.

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no more than to be heard. We do not ask for any particular judgment. We are perfectly content to leave the judgment, whatever it may be, upon the articles propounded in this case, to that tribunal to which alone it ought to belong and does belong. We ask to enforce no particular sentence. We simply claim the right to be heard, and to put forward those objections which may be made in the proper quarter; and this court, I apprehend, will not hesitate about its right of exercising jurisdiction, or the propriety of exercising it, in such a case.

Rex v. Justices
of Kent.

The principle of this court interfering to compel justice to be done, and parties to be heard, was distinctly shown by those cases which were cited by Sir *Fitzroy Kelly* in moving for this rule (b); and there is also before me another case, which I think was not cited at that time, but which is clearly in point. It is *The King v. The Justices of Kent*, in the 14th volume of *East's Reports*, p. 395. The rule which Lord *Ellenborough* lays down there is, that "if the justices had rejected the application in the exercise of the discretion vested in them by the legislature, this court would not interfere; but if they had rejected it on the ground now stated, that they had no power to grant it, the court would interfere, so far as to set the jurisdiction of the magistrates in motion, by directing them to hear and determine upon the application." That is just the case here. These learned commissioners, or judges, at Bow Church, declared that they had not the power, that the statute of Henry 8 took from them all discretion upon the subject, and that they should incur the penalties of *præmunire* if they proceeded to allow any person even to appear. They therefore have mistaken the law; and this court, when an inferior tribunal mistakes the law, will undoubtedly set it right. That was decided in this court with reference to a prohibition, in the case of *Gould v. Gapper*, reported in 5 *East*, 345. There, the court distinctly held, that in any case of an inferior tribunal, whatever the nature of the cause may be, if the inferior tribunal exceeds its jurisdiction, or acts wrongly, in consequence of mistaking an act of parliament, this court will interfere by prohibition. I apprehend, my lords, that the principle applicable to prohibition is equally applicable to mandamus; and that if this court will interfere by prohibition to restrain an excess of jurisdiction in an inferior court, where it has mistaken the effect of an act of parliament, so, by the same rule, and upon the same principle, it will interfere by mandamus to compel the court to exercise its jurisdiction where it refuses to do so by reason of a similar mistake. In the one case, there is a failure of justice in consequence of the refusal to hear at all, and to do that for which the court is constituted; in the other case, there is the excess of authority, the doing of that which the court is not entitled to do. In the one case, therefore, it is acted on by mandamus; in the other, by prohibition. But the principle in both cases is precisely the same, and the analogy perfectly clear between the prohibition in the one and the mandamus in the other.

Gould v.
Gapper.

Bayly v.
Boorne.

There are various cases to the same effect. There is one in

Strange, Bayly v. Boorne, p. 392. There is also the case of *The King v. The Bishop of Lincoln*, in 2 *Term Reports*, 338, n. And there are many others which show that a mandamus will lie to the ecclesiastical as to all other courts. There is also a variety of authorities cited in *Viner's Abridgment*, tit. "*Mandamus*," H. 3. So that, I think, it is indisputable, that in any case where a court refuses to exercise its jurisdiction, and to do that for the very purpose of which it is constituted, this court will not allow a failure of justice, through such improper refusal.

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Rex v. Bp. of Lincoln.

Vin. Abr.

My learned friend, Mr. *Waddington*, yesterday, I think, said, that this court would not interfere where an ecclesiastical court had mistaken a matter of ecclesiastical law (c). Be it so. This is not a matter in which the ecclesiastical court has made a mistake on a point of ecclesiastical law. It is a matter of statute law: it is upon the construction of the statute of the 25th of Henry 8. And then, if so, the principle laid down in *Gould v. Gapper* directly applies.

Then, again, whether there is a right of appeal from the court below, or whether there is not, is really quite immaterial; because we are not in a situation to consider whether we could have appealed. We were not permitted to be heard at all. We were not allowed even to enter an appearance, or to have our proctor treated as a proctor; but we were dismissed *in limine*, and denied a footing in the court altogether. There can be therefore no appeal in such a case; for there is no suit entertained, and no judgment given; nothing for a court of appeal to consider. But suppose, my lords, that in the sheriffs' court, or in any of the courts of the city of London, a question existed respecting any property to which a person sought, as a suitor, to enforce a claim,—as for instance, upon an interpleader, or otherwise,—and the court refused to hear him, upon some misconception of its powers, or some erroneous interpretation of a statute, this would not be a ground for any appeal, but for an application to this court for a mandamus.

No power of appeal in the present case.

Then I apprehend, there can be no doubt that this ecclesiastical tribunal is a court. I think after a practice of more than three hundred years, in which the forms of a court have been observed, sentences have been given judicially, parties have been cited, and witnesses examined upon oath, and every thing carried on in the form of a court, and since the very proceedings which my learned friends on the other side are seeking to uphold are actually drawn out in a judicial form, it does not lie with them, or with any body, to say that this was not a judicial proceeding in an established court. My lords, the court in which the proceedings in question were held is, I believe, properly called the Court of Audience, or a branch of that court; and there can be no question that the Court of Audience is one of the superior ecclesiastical courts. It is so treated by Lord *Coke* (d); it is so treated by *Comyns*, in his *Digest* (e); and there are

The ecclesiastical tribunal, in the present case, a court.

Court of Audience.

Coke.

Com. Dig.

(c) *Supra*, p. 254.

(d) *Vide supra*, p. 225.

(e) Tit. Courts, N. 4. "The Court of Audience is held in the archbishop's palace, before his vicar general in spirituals.

"The jurisdiction does not relate to causes between party and party, but to matters *pro forma*. 4 Inst. 337.

"As, the consecration and confirmation of bishops elected. *Ibid.*"

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Ayliffe's Pa-
rergon.

23 Hen. 8,
c. 9.

other authorities to show that it is strictly a court of a high nature. It is stated in *Ayliffe's Parergon* to have jurisdiction equal to that of the Arches (f); and it is expressly referred to by the statute of the 23rd of Henry 8, c. 9, as one of "the high courts of the archbishops of this realm." It follows, therefore, my lords, that this is a court to which your lordships' mandamus may be directed; and if it may, I trust that, under circumstances like the present, your lordships will determine that it ought to issue.

I come therefore to the real question in the case, namely, whether what the commissioners or the judges at Bow Church determined is right or wrong; whether, in point of fact, the Court of Audience or the court of the Vicar General, at Bow Church, was precluded by the statute of the 25th of Henry 8, c. 20, from entertaining the objections that were proposed, or from hearing the parties. My lords, that brings us to the construction of that statute; whether it had that effect or whether it had not. And in order to determine that, of course we must look—

Mr. Justice ERLE. One step that was contended for on the other side was, that the vicar general was acting as vicar general, and not as presiding in the Court of Audience. An authority was cited to that effect (g).

Mr. *Badeley*. The passages in the *Institutes* and in *Comyns's Digest* expressly refer to the Court of Audience, and expressly refer to the confirmation of bishops as one of the matters within its cognizance.

The *Attorney General*. The passage in the 4th *Institute* says, all these are matters of form.

Mr. *Badeley*. No. It says, "the vicar general does preside in matters *pro forma*."

Mr. *Waddington*. "As confirmations of bishops' elections."

Mr. *Badeley*. That being a matter which primarily is not one between party and party. It is not primarily one of contentious jurisdiction; but it is not therefore necessarily a matter of mere form. And in whatever comes properly under the cognizance or consideration of the court, in deciding any question which belongs to it, and which, though primarily it may be matter of form, may afterwards, or perhaps collaterally, become matter of serious inquiry and discussion, the court will be bound to exercise its functions fully, and allow the inquiry to be carried out. I think I shall be able to satisfy your lordships upon this point, that the confirmation of bishops, though it may be matter of form, and will be so, if no person really appears and makes objection, and the archbishop or his representative is satisfied of the fitness of the bishop elect, yet is by no means a

Confirmation
not necessarily
a merely formal
proceeding,
though usually
so.

(f) "Next unto this court [the Court of Arches] is the Court of Audience, held in Paul's Church in London; which court, though of equal jurisdiction with the former, yet it is inferior thereunto in point of dignity, as well as antiquity; and the judge of this court is styled the Auditor, or *Official of causes and matters in the*

Court of Audience of Canterbury. This was anciently held in the archbishop's palace; wherein, before he would come to any final determination, his usage was to commit the discussing of causes privately to certain persons learned in the laws, styled thereupon his *Auditors*." *PABERG*. p. [192].

(g) *Supra*, p. 225.

merely formal proceeding if any objector comes forward: it then becomes a matter of right that the party should be heard to state his objections, and that those objections should be judicially considered. And therefore, when the authorities speak of this or any other business of the Court of Audience as "*matters pro formâ*," this must be understood *secundum subjectam materiam*. Such things may be in the first instance, and frequently are altogether, formal; just as an undefended action in a court of law is a mere formal inquiry. But they may occasionally be more than formal: some of them may be disputed; and when they become so, according to the established course and practice of the court, they must be regularly prosecuted. The authorities only refer to what generally happens in such cases.

Now, in order to determine the question respecting the effect of the statute of Henry 8, it will be necessary for us to consider what was the state of the law prior to the passing of the statute; whether the confirmation of a bishop was a matter in which a judicial inquiry would be instituted, before the statute; and whether the archbishop had authority to make it to the full extent, and did make it; and then, if that was so, whether there is anything in that statute itself, or in the circumstances under which it was enacted, which drives us necessarily to the conclusion that confirmation was intended to be a mere shadow, a mockery, or little better. Then we shall afterwards see, whether the statute has been so understood, and whether the practice which has prevailed from its enactment to the present time does not furnish an answer to that inquiry.

Now, my lords, I apprehend that the right of the archbishop of a province, as metropolitan, to exercise a most anxious and scrupulous inquiry into the fitness or incompetence of any person presented to him for consecration, is such as is absolutely inherent in him, as metropolitan; that it has always been so; and that the church at large has always deemed it to be a positive duty, as well as an inherent right, of the metropolitan.

My lords, it is supposed, and supposed with reason, that this right of the metropolitan is derived from nothing less than Scripture itself; because it appears perfectly clear from the Epistles of St. Paul, both to Timothy, and to Titus, that the authority vested in those persons for the laying on of hands was such as to give them power, and not only to give them power, but absolutely to require them, to exercise the most careful and diligent inquiry into the previous life, habits, and character, of the "*persona electi*," to use the language of the canon law. The words of St. Paul to Timothy are in the 3rd chapter of the 1st Epistle, the second and following verses: there he distinctly states what are the different qualifications which a bishop, or person who is to be proposed as bishop, is to have; and, among the rest, there is an expression that the bishop must be "*blameless*;" which in the Greek, as I have it here, is "*ἀνεπίληπτον*," meaning that the party is not liable to any objection, or any charge; that he is *irreprehensible*, (that is perhaps the closest translation of it). And in the Epistle to Titus, in the 1st chapter, it is stated particularly, that Titus was left in the island of Crete, in order that he might "set in order the things that were wanting, and ordain elders in every city." He therefore had a complete right of ordering, whether

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Metropolitan's
inherent right
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inquiry.

Derived from
Scripture.

Scriptural qua-
lifications of a
bishop.

1 Tim. iii. 2.

A bishop must
be "*blame-
less*."

Tit. i. 5.

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bishops, or priests, or deacons. No person could act there without having his sanction, if he was to be properly constituted, and have spiritual jurisdiction. And immediately after that, the verses come which state more fully what the qualities of an *ἐπίσκοπος*, or a bishop, are; and among the rest, and standing foremost in the list of qualifications, a bishop is required *ἀνέγκλητον* εἶναι, ὡς Θεοῦ οἰκονόμον; that he should be "blameless," as it is translated in our version; in other words, that he should not be liable to any charge; for I believe the expression "*ἀνέγκλητον*" would be more correctly rendered "not liable to any charge," or to "any imputation." And then the passage goes on, and states various other qualifications, which the bishop must be found to possess; most of them referring, more or less, to the character which the man has maintained in life previously; and some to his profession of faith, and to his future conduct: these being points of inquiry on which Titus was required to satisfy himself, before he consecrated any man; and therefore furnishing a rule, by which all those who exercise the same functions are bound to guide themselves in this most solemn and responsible duty. From all this I venture to say, that the metropolitan's right of examination into the character of those whom he is desired to consecrate is guaranteed to him by Scripture itself, or at least is so clearly deducible from Scripture, that it ought not to be the subject of controversy at all; and that it is inherent in him.

The Scriptural
standard always
the rule of the
church.

Now I maintain that such has always been the rule of the church, and the understanding of all Christendom upon this subject; and I think there is sufficient evidence from the earlier canons of the church, and from councils long prior to the formation of the body of the canon law, as well as from the canon law itself, to show that this is so, and must be so.

Apostolical
Constitutions.

My learned friend, Dr. *Addams*, I believe, referred to the *Apostolical Constitutions* (*h*). He did so with some qualification of their authority. It is not very long ago that I had the honour of submitting to your lordships certain considerations, in another case (*i*), as grounds for saying that the Apostolical Constitutions are of high authority; that though they may not have been collected together into one till a late period, the 3rd or 4th century, still it is generally understood that they are a collection of the canons which were then in existence, and which had been duly framed at different periods of the church, and in different portions of it. Therefore they are, at all events, a very strong evidence of what was the real judgment of the church at the time.

33rd Apost.
Can. Early
recognition of
the authority of
the metropo-
litan.

The 33rd of the Apostolical Canons, says, expressly, "*Επίσκοπος uniuscujusque gentis nosse oportet eum qui in eis est Primus, et illum existimare ut caput, et nihil facere quod sit arduum aut magni momenti præter illius sententiam; illa autem facere unumquemque quæ ad suam parochiam pertineat, et pagos qui ei subsunt. Sed nec ille absque omnium sententiâ aliquid agat. Sic enim erit concordia, et glorificabitur Deus per Dominum Jesum Christum.*" So that there the office of the metropolitan or primate is recognized,

(*h*) *Supra*, p. 293.

(*i*) *Regina v. The Inhabitants of St.*

Giles in the Fields, argued in June, 1847, and not yet reported.

and in later canons and later councils this was drawn out much more distinctly.

I think Dr. *Addams* referred to the 6th canon of the council of Nicæa. There is the 4th also. The 4th and 6th are certainly very strong in showing what was the judgment of the church at this time. The 4th is, "Episcopum oportet ab omnibus episcopis, si fieri potest, qui sunt in provinciâ ejus ordinari. Si vero hoc difficile fuerit, vel aliquâ urgente necessitate, vel itineris longitudine, certe tres episcopi debent in unum esse congregati, ita ut etiam cæterorum qui absentes sunt consensum literis teneant, et ita faciant ordinationem. Potestas sane vel confirmatio pertinebit per singulas provincias ad metropolitani episcopum." There confirmation is distinctly mentioned, and that confirmation shown to belong to the metropolitan. And your lordships will recollect that the council of Nicæa, as are the others of the first four general councils, is expressly authenticated by the legislature of this country, and referred to as an authority in a statute of the 1st of Elizabeth (*j*). And therefore, my lords, in citing the canons of the council of Nicæa, or any of the first four general councils, I am citing only that which the legislature, by a law still in force, has treated as authentic.

The *Attorney General*. Only as far as heresy is concerned. It is confirmed by the statute of Elizabeth only as to heresy.

Mr. *Badeley*. It is expressly confirmed on the subject of heresy. But I think it must be clear also, that if the statute vouches in a general way, as in form it does, the first four general councils, they are to be regarded with some degree of authority in this court, or in any court, and that they are sent forth with a voucher which no others have.

Then comes the 6th canon, which is, "Mos antiquus perduret in Egypto vel Libya et Pentapoli, ut Alexandrinus Episcopus horum omnium habeat potestatem; quoniam quidem et Episcopo Romano parilis mos est. Similiter autem et apud Antiochiam cæterasque provincias honor suus unicuique servetur ecclesiæ. Per omnia autem manifestum est, quòd si quis præter voluntatem et conscientiam metropolitani episcopi fuerit ordinatus, hunc concilium magnum et sanctum censuit non debere esse episcopum." No words can be stronger than those; and here is one of the most important councils of the church,—one of the most important councils ever held,—here

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Canons of the Council of Nicæa.

4th canon.

6th canon.

(*j*) 1 Eliz. c. 1, s. 36. "Provided always, and be it enacted by the authority aforesaid, that such person or persons to whom your highness, your heirs or successors, shall hereafter by letters patents, under the great seal of England, give authority to have or execute any jurisdiction, power, or authority spiritual, or to visit, reform, order, or correct any errors, heresies, schisms, abuses, or enormities, by virtue of this act, shall not in anywise have authority or power to order, determine, or adjudge any matter or cause to be heresy, but only such as

heretofore have been determined, ordered, or adjudged to be heresy, by the authority of the canonical Scriptures, or by the first four general councils, or any of them, or by any other general council wherein the same was declared heresy by the express and plain words of the said canonical Scriptures, or such as hereafter shall be ordered, judged, or determined to be heresy by the high court of parliament of this realm, with the assent of the clergy in their convocation; any thing in this act contained to the contrary notwithstanding."

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is this council, amongst its earliest canons, declaring this, that if any bishop were ordained or consecrated within the province of the metropolitan, without his sanction, "*præter voluntatem et conscientiam metropolitani*," he was not to be bishop at all.

Mr. Justice COLERIDGE. Does it amount to that?

Mr. *Badeley*. "*Quòd si quis præter voluntatem et conscientiam metropolitani episcopi fuerit ordinatus, hunc concilium inagnum et sanctum censuit non debere esse episcopum.*"

The *Attorney General*. What is the date of that?

Mr. *Badeley*. It is the first council of Nicæa, in the year of our Lord 325. Your lordships will find the canons of the different councils in the first volume of *Harduin* (*h*). The first I cited is in the Apostolical Constitutions, at the 18th page of the first volume of *Harduin*; the second and third are at pages 324 and 325.

Council of
Antioch.
19th canon.

Then we have another council in the year 341, the council of Antioch, another general council of great authority. The 19th canon of this says, "*Episcopum non ordinandum sine consilio et præsentia metropolitani episcopi, cui melius erit, si ex omni provincia congregentur episcopi. Quòd si fieri non potest, hi qui adesse non possunt, propriis literis consensum suum de seipso designent, et tunc demum, post plurimorum, sive per præsentiam, sive per literas consensum, sententia consona ordinetur. Quòd si aliter quam statutum est fiat, nihil valere hujusmodi ordinationem.*" The authority and rights of the metropolitan are thus distinctly asserted. That is at page 602 of the same volume of *Harduin*.

Council of
Laodicea.
12th canon.

But soon afterwards, in the year 372, in the council of Laodicea, we have a canon which is, if possible, still stronger, and which completely corroborates in substance the Nicene council. This was the council of Laodicea in the year 372. The 12th canon is, "*episcopos non oportet præter judicium metropolitanorum et finitimorum episcoporum constitui ad ecclesiæ principatum. Nec eligantur nisi hi, quos multo ante nota probabilisque vita commendat; et nihilominus in sermone fidei et recta operatione per suam conversationem fuerint probati.*" So that here we have, in this general council, the authority of the metropolitan and his jurisdiction upheld, and the business of the inquiry thrown upon him; an inquiry, namely, into the life, and character, and faith of the person proposed for ordination. I ought to state, that is at page 783 of the first volume of *Harduin*.

2nd Council of
Carthage.
12th canon.

4th Council of
Carthage.
1st canon.

Then, my lords, in the second council of Carthage, there is a canon which I need hardly read at length, but which is very much to the same effect as the 12th canon of Laodicea. And then we have another, which is in the 4th council of Carthage; which is so important, that I must call your lordships' particular attention to it. It is the very first canon of the 4th council of Carthage, which was held in the year 398. "*Qui episcopus ordinandus est, antea examinetur, si naturâ sit prudens, si docibilis, si moribus temperatus, si vitâ castus, si sobrius, si semper suis negotiis cavens, si humilis, si affabilis, si misericors, si literatus, si in lege Domini instructus, si in Scripturarum sensibus cautus, si in dogmatibus ecclesiasticis exerci-*

(*h*) "Collectio regia max. conciliorum ab anno 34 ad ann. 1714."

tatus; *et ante omnia, si fidei documenta verbis simplicibus asserat*; id est, Patrem et Filium et Spiritum Sanctum, unum esse Deum confirmans,"—and so on. Then it goes on, and recites at length the articles of the creed, and then it proceeds: "Quærendum etiam ab eo, si Novi et Veteris Testamenti, id est, Legis et Prophetarum, et Apostolorum, unum eundemque credat auctorem et Deum." And then it goes on, and refers to various heresies which were in existence at that day, which he was expressly required to renounce. Then, my lords, at the latter part of the canon: "Cum in his omnibus examinatus, inventus fuerit plene instructus, tunc *cum consensu clericorum et laicorum*, et conventu totius provinciæ episcoporum, *maximeque metropolitani vel auctoritate vel præsentia*, ordinetur episcopus. Suscepto in nomine Christi episcopatu, non suæ delectationi, nec suis motibus, sed his patrum definitionibus acquiescat. In ejus ordinatione etiam ætas requiratur, quam sancti patres in præeligendis episcopis constituerunt. Dehinc disponitur, qualiter ecclesiastica officia ordinantur." That is at page 978, in the first volume of *Harduin*. It is the first canon of the 4th council of Carthage.

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Then, my lords, in some of the later councils there are canons to the same effect; to which I would refer, but I will not trouble your lordships by reading them at length. There is the 25th canon of the council of Chalcedon, which was held at a later period, but which is generally cited as one of the first four general councils. And your lordships will find the acts of that council in the 2nd volume of *Harduin*, p. 601, &c. Then there is the council of Arles, the canons of which occur in the 2nd volume of *Harduin*, p. 774. The 5th canon is to this effect: "Episcopum sine metropolitano, vel epistolâ metropolitani, vel tribus comprovincialibus episcopis, non liceat ordinare: ita ut alii comprovinciales epistolis admoneantur, ut se suo responso consensisse significant. Quodd si inter partes aliqua nata fuerit dubitatio, majori numero metropolitanus in electione consentiat." And the 6th canon then follows in these words: "Illud autem ante omnia clareat, eum qui sine conscientia metropolitani constitutus fuerit episcopus, juxta magnam synodum esse episcopum non debere."

Council of Chalcedon. 25th canon.

Council of Arles. 5th canon.

6th canon.

The authority of the metropolitan is recognised in each of these, more or less; but those I have read from the early councils are quite sufficient to show that the church proceeded upon the rule of Scripture, to which I referred in the first instance, the authority of St. Paul himself; and that the power vested in the metropolitan was not merely the power of conferring orders, or ordination, and consecration, but that upon him rested an obligation of the highest nature, to inquire beforehand into the character, faith, morals, and habits, of the men proposed for such offices.

The early councils impose on the metropolitan the duty of inquiry.

Your lordships will find that the rule of the earlier councils was at once adopted into the canon law itself. In the earlier part of the *Corpus Juris Canonici*, you find the same rule. In the first part of the *Decretum*, in the *Corpus Juris Canonici*, you have, at page 107 of the first volume of the folio edition, the 23rd *Distinctio*. There we have a long canon entitled "*Quomodo sit examinandus qui in*

The rule of the earlier councils adopted into the *Corp. Jur. Can.*

Decret. I. xxiii, 2.

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Decret. I.,
lxiv., 8.

Decret. I.,
lxv., 2.

Decret. I.,
lxv., 5.

The same rule
recognised in
all books of the
canon law.

Dupin, de
Antiq. Eccl.
Discipl.

episcopum eligitur." And then we have given, and I believe in the very same words, the very canon to which I referred your lordships from the 4th council of Carthage. It gives the canon at length, adopting it as part of the general body of the canon law. And the glosses upon this passage distinctly recognise the same doctrine. You will find that that has always been considered a part of the canon law, of which there never has been a doubt as to its universal application.

So again in the first part of the Decretum; in Distinctio 64: "Illud generaliter est clarum, quòd si quis præter sententiam metropolitani fuerit factus episcopus, hunc magna synodus diffinivit episcopum esse non oportere." Very much in the same language as I read to your lordships from the one of the canons of the council of Arles. So that here is the rule of the canon law upon the subject. And a little afterwards, in the very same page of the Decretum which I have just cited to your lordships, there is, "Non debet ordinari episcopus absque consilio et presentia metropolitani episcopi." And it goes on, and shows what are the different things which the archbishop is to inquire into; and afterwards it says: "Si autem aliter quam statutum est fiat, nihil valere hujusmodi ordinationem." And then, it says, "Placet omnibus, ut inconsulto primate cujuslibet provinciae, tam facile nemo presumat, licet cum multis episcopis, in quocumque loco, sine ejus, ut dictum est, præcepto, episcopum ordinare." The right of the primate is distinctly recognised again, and it is clear beyond all question, in all books relating to the canon law which I have ever seen or heard of, that the authority of the metropolitan is stated pretty nearly in the same terms, and the obligation is thrown upon him to inquire, and examine most diligently, into the faith and habits and character of the individual. And that was always carried out, my lords, practically, in this country, as in others. That rule of the canon law has universally prevailed wherever episcopal authority has been established.

Now of the writers upon the canon law, we have had several cited to us already by my learned friend Sir *Fitzroy Kelly*, in moving for this rule, and others have been cited on the other side, and various comments have been made upon them; but they all tend to show the same thing, namely, the extent and nature of the metropolitan's jurisdiction, and that it was of that kind and quality which had been declared by the canons of the ancient church. Nothing could be done without the sanction of the metropolitan, and in order to determine whether any person should be ordained or not, it was necessary for him to be submitted to the metropolitan himself, who was to examine and decide accordingly. My lords, the nature of the metropolitan's rights and privileges are shown in a book which I dare say may be in the hands of some of your lordships,—for it is a book which is well known,—*Dupin* (who was a very learned writer both as a canonist and general historian) *De Antiquâ Ecclesiæ Disciplinâ*. In the 12th chapter, at page 62, there is a long disquisition, and a learned one, "De juribus et privilegiis metropolitanorum;" in which he distinctly shows what were the

rights of the metropolitan, with reference to the ordination of priests and the consecration of bishops. He refers to those councils which I have already cited to your lordships; and he refers also to a great number of authorities of a later period in the church, as proving how fully and completely those rights of the metropolitan were recognised, and how constantly they were exercised in the church, throughout all periods. At page 62, he says, "Primum metropolitani jus, idque antiquissimum, est ordinandi episcopos provinciae. Hoc autem sic fieri solebat. Clerus et populus urbis cujus episcopus modò defunctus erat, episcopum eligeant, ut innumeris testimoniis probari posset; quia vero fieri non poterat, ut in eligendo non parum errarent, hominemque sacerdotio indignum, ad tantam dignitatem promoverent, electiones ab episcopis ordinatoribus examinandæ et discutiendæ erant. Quoniam vero magna fuisset orta turba si cuivis passim episcopo licuisset episcopum ordinare, statutum est ut episcopi electio confirmaretur ab episcopis provinciae, præsertim verò à metropolitano." He gives that as the deduction which he makes from the various authorities which he cites; and he gives it as a matter perfectly clear, that the rights of the metropolitan were to ordain the bishop, and that there was to be, upon that, a full examination and discussion of the election, and the fitness of the individual elected, in order to guard against an improper choice.

There is also a summary of this in *Fleury's "Institution au Droit Ecclésiastique,"* where in the 10th chapter of the first part, he refers to these duties of the metropolitan; he is speaking of the confirmation of the election of a bishop; and then he says, "Le métropolitain fait appeler toutes les parties intéressées; savoir, ceux qui paroissent co-élus, ou opposans, par des citations expresses; les autres par des affiches. Les délais passés, il procède au jugement, soit avec les parties, soit d'office, si personne ne se présente pour combattre, ou pour défendre l'élection." So that there is an election, according to this writer, which would be *pro formâ* if nobody appeared at all; but it would be with full consideration of the matter before the parties, supposing any one did appear to oppose. He then proceeds to say, "Ce jugement consiste à examiner les qualités de l'élu et la forme de l'élection. Et s'il y a des contradicteurs, le procès peut être fort long. Il peut y avoir grand nombre d'opposans; et chacun peut avancer autant de causes de nullité, qu'il peut y avoir d'irrégularités et d'incapacités en la personne de l'élu, et de chacun des électeurs; et qu'il y a de défauts de formalités dans l'élection."

My lords, the authority of Fleury is of very great value here. His "*Institution au Droit Ecclésiastique*" is a work of acknowledged merit. He was a very learned man, a member of the French church; and I apprehend the practice of the French church, at least in the earlier period before the Reformation, was very much assimilated to the practice of the church of England. He gives then what he understood to be the rule and practice of the canon law, and certainly that which had long been in force, and prevailed in France in his time, which was more than a century ago; for he was confessor to Louis 15.

Mr. Justice ERLE. Does he speak of an election by all the

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Fleury, *Institution au Droit Eccles.*

Practice of the French church, anterior to the English Reformation.

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Mr. Badeley's argument. Mr. *Badeley*. He is speaking of the elections by the chapter.

Mr. Justice ERLE. Will you draw our attention to what it is he is speaking of?

Mr. *Badeley*. He is speaking of elections generally; and he includes among them elections by chapters. He is not merely speaking of elections of the more popular kind; but he is speaking also of the elections by chapters; and he shows here that the inquiry was to be, not only as to the election itself, but as to the character of the elected. It might extend, he says, over a very long period. There might be very many people who might come and make objections; and it was the duty of the metropolitan to discuss and consider them all, and allow of course the parties to be heard.

The general rule in all the treatises I have been able to consult, is to the same effect, that the metropolitan is to examine, in order to ascertain whether consecration is hereafter to take place or not. I could refer your lordships to other authorities on the subject, among others to one of great name as a canonist, Barbosa, in his "*Jus Ecclesiasticum Universum*," where the same thing is laid down. It is in the chapter, "*De Episcoporum Confirmatione et Consecratione*," that is, chapter 9, liber 1, page 140 of the folio.

Barbosa. *Jus. Eccles. Univers.*

The same rule universally received in this country.

This being the general rule of the canon law, which had existed as a rule, which was adopted from the earliest canons, and from canons which were always deemed of the highest importance, I think it is equally clear that it was a rule which was universally received in this country. A great deal of observation was made, by some of my learned friends on the other side, as to what was the value of the canon law here. I think the *Attorney General* said, it was to be regarded as foreign law, and that your lordships could not take cognizance of it (*l*). I apprehend that is quite a mistake. Your lordships know that the canon law generally was the received ecclesiastical law of this country; and I find it expressly laid down, upon clear authority, that your lordships will take cognizance of that which is the ecclesiastical law of the land. In *Viner's Abridgment*, title *Court, D.*, it is said, (and various old authorities are cited for it), that "the judges of the common law shall take cognizance what is the law of the church, or of the admiralty, &c." And perhaps, with regard to the canon law, and its effect here, I cannot do better than read to your lordships the language of the late lamented Sir *William Follett*, in arguing a case before the House of Lords; and I cite it with the more confidence, because the principle of it was admitted by certain noble and learned lords who were present there, and who recognised it with reference to the case then before them, which was one of marriage law. Sir *William Follett* said (*m*), "Let me address your lordships for one moment with respect to the canon law. The canon law was the law of the church, the ecclesiastical law. The

Authority of the canon law in England.

Vin. Abr.

(*l*) *Supra*, p. 157.

(*m*) In *The Queen v. Millis*, reported 10 Cl. & Fin. 534. The passage cited

in the text is taken from the shorthand writer's notes.

canon law was received in this country, and became the law of this country, except so far as it clashed with or was conflicting with the common law of the land. We know, my lords, one striking instance in which the canon law was not adopted into this country, because it interfered with one of the principles of the common law, with reference to that branch of it which we are now discussing. It was not received in this country for the purpose of legitimizing bastards born before marriage; and no doubt, my lords, the canon law did not become the law of England, so far as it conflicted with any principles of the common law; but otherwise it is the law of this country; it is the ecclesiastical law of the country; and I do not understand, my lords, speaking with very great deference (and no one can feel more) to one of the learned judges of the court below,—I do not understand the meaning of ‘the king’s ecclesiastical law’ as distinct from the canon law. The ecclesiastical law, my lords, is the canon law; and it is the canon law only as far as it does not conflict with the common law of England. It has been received in this country; it has been adopted in this country; and is in full force where it does not conflict with the law of the land.”

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The *Attorney General*. That is not true.

Mr. *Badeley*. I think it is true indeed. I apprehend, with respect to the earlier body of the canon law, to which I have called your lordships’ attention, there is authority both from *Blackstone* and *Hale* to say, that that is part of the canon law of the land, and I contend it would be so, upon principle and upon reason.

Lord DENMAN. Sir *William Follett* argued in favour of the marriage. He resorted to the canon law, to show that such marriages, without the intervention of a priest, might be good, and he states what you have read. But Lord Chief Justice *Tindal*, speaking in the name of the twelve judges, quoting Lord *Coke* and Sir *Matthew Hale*, distinctly says the canon law is not the law of England, except it has been proved and adopted in this country (*n*).

Mr. *Badeley*. If it has been proved, and received and adopted in this country, of course there can be no doubt that it is the ecclesiastical law of the land. I think there is authority from *Blackstone* and *Hale* for saying that the general body of the canon law, the earlier collection of the canon law, is the ecclesiastical law of this land and has been so received and adopted; and if so, the *onus probandi* of showing that any portion of the canon law is not the law of England, lies upon those who make objections to it; and it would rather be for my learned friends to show that it was not received, than for us to show that it was. Because, look at the state of the church, my lords, at the time. Look at the unity which prevailed among the nations of Europe upon religious matters; and the probability would be that if any law were laid down for the church generally, it would be received universally, and be admitted at once, and acted upon in the various countries which were under the same ecclesiastical rule; and if at that time, if, before the Reformation, there was any general rule of law which was sanctioned and adopted by the Roman church, that would be at once the canon law of this country, and take effect

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Authority at-
tributed to the
canon law in
England by
Lyndwood and
other English
canonists.

The notes and
glosses of
Lyndwood and
John de Athon
relate to elec-
tions and con-
firmations of
bishops.

here; and the ecclesiastics of this country, the ecclesiastical judges of this country, would enforce that law, and act upon it, as they did act upon it; and I think we have the clearest evidence and most abundant proof of that in the work of *Lyndwood*, and in those of *John de Athon* and other English canonists of early date. We have in the different positions which they lay down, in the different matters of which they treat, citations in every page from the general body of the canon law. They cite the provisions of the *Decretum*, and the other authorities which I have referred to, at length. So that, as far as *Lyndwood* goes, and *John de Athon*, and the English canonists at that time, they are evidence, and the most conclusive evidence, that the general canon law was at that time in force in England, and constituted mainly the ecclesiastical law of this country. And that being so, it must at least be presumed to be in force unless the contrary can be shown.

Now in the passages which were cited from *Lyndwood*, and from *John de Athon* upon the constitutions of *Othobon* (o), I submit that we have distinct proof that those rules of the canon law with reference to metropolitans and elections generally, were the ecclesiastical law of this land, and were in force here with reference to this very matter, the confirmation and consecration of bishops. My learned friends on the other side found some fault with one of the citations which had been made with reference to confirmations generally (p); and I think it was said that it was a commentary of *Lyndwood's* upon a constitution of Archbishop *Peckham*, which did not treat of and did not refer to the elections of bishops, but only of inferior prelates. I admit that, with reference to the constitution itself; but I do not admit that the notes and glosses of *Lyndwood* apply solely to inferior prelates. I think it will be found that those rules which he lays down with reference to elections, and what will make elections void, are the same, whether they are elections of bishops, or of inferior prelates; the general rules with respect to elections, and confirmations of elections, being, that parties shall be cited, and there shall be an opportunity for a proper discussion of the merits of the individual; that those shall take part in it who are entitled to take part; and that if an election is made, and the confirmation of the election takes place, without those rules being followed which are there given, the confirmation of the election is void. It will be found that the rules there given are just the same with respect to the election of bishops, as of others; and that therefore the criticism of my learned friends upon that citation is not one which can be allowed to be of any weight.

And in the *Tabula* which is prefixed to *Lyndwood's Provinciale*, I find the reference to be this, "Confirmationem electionis qualis debet præcedere vocatio." And then, referring to the passage cited, as showing the rule which applies to all confirmations of elections generally, he adds, "Et ibi nota subsequuntur quæ sunt servanda in negotio confirmationis."

But, my lords, I am satisfied that the matter is clear beyond all doubt, that these English canonists assert the right of the metropolitan, and his duty to examine, and that he is to exercise a discretion

(o) *Supra*, pp. 113, 114, 180, 235.

(p) *Supra*, pp. 130, 178, 181.

in confirming the election or not. I assert that this follows and is clear from two or three passages of *John de Athon*, in his notes to a constitution of Otho, "*De Officio Archiepiscoporum et Episcoporum*," and also in his glosses on a constitution of *Othobon*, "*De Confirmatione Episcoporum* (q)." There are rules there given for the conduct and guidance of archbishops and bishops; and as some of the passages are very long, I will not trouble your lordships with them; but they put it beyond all question, by their references to the general canon law, that the rules of the canon law were in force here; that it was the duty, and therefore that it was an obligation upon the archbishop, in this country as in others, to examine into the doctrine, morals, habits, and character of the individual; that the questions before him were of a very serious and very minute kind; that he exercised his office judicially; and that the forms then used were pretty nearly the same as have subsisted to the present day. Thus we have cogent evidence of what was the rule in the earlier period of English history; for the date of this commentary, I believe, or at least of the constitution of *Othobon*, is in the reign of King Henry 3. And if this was the rule, there is no reason to doubt that it was the practice, and that the archbishop, if he saw fit, and the inquiry was not satisfactory to him, might annul the election.

My lords, in a work of considerable interest and value, *Wharton's Anglia Sacra*, in the first volume, there are various proofs and examples given from early writers prior to the Reformation, of the practice in this country, with respect to confirmation. At p. 315, we have an instance in the bishoprick of Winchester, where a person who had been bishop of Bath was elected to the see of Winchester, and rejected by the then archbishop of Canterbury on account of a canonical disqualification. "*Electum Johannes Cantuariensis Archiepiscopus ob crimen pluralitatis beneficiorum olim commissum rejectit, virtute canonis a Concilio Lugdunensi anno 1274 lati.*" Then follows this passage: "*Rejecto Bathoniensi Monachi elegerunt Ricardum de la More, Archidiaconum Wintoniensem et Subdecanum Lincolnensem, 1280, 6 Novemb. Admissus is a Rege fuit, sed ab Archiepiscopo, ecclesiasticæ disciplinæ observantissimo, ob idem pluralitatis crimen reprobatus. Romam igitur petiit, inito itinere 1281, 5 Cal. Martii; et pro confirmatione electionis suæ obtinendâ multum desudavit. E contra Archiepiscopus, missis ad curiam procuratoribus, nullum non lapidem movit, ut illum episcopatu excluderet; tantâ usus instantiâ, ut nisi res pro voto cederet, Archiepiscopatum abdicare decreverit.*" He determined to give up his archbishoprick, if the matter should not end as he desired. Then there is the letter which he wrote; and the history says at last, "*Electio demum â Papâ cassata est, anno 1282, haud ita tamen ob importunas Archiepiscopi preces, quam quia Ricardus ne obolum quidem pro confirmatione habendâ simoniæ metu dare vellet.*" However, there we have an instance of the consideration of the merits or demerits of the man, with a view to his confirmation, and the archbishop annulling the election, and a controversy thereupon raised between the archbishop and the crown. The question is then

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carried by appeal to Rome; and the matter decided at Rome, according to the archbishop's desire.

Mr. Justice ERLE. What is the date of that?

Mr. *Badeley*. That, my lord, is of the date of 1281 and 1282. Then, my lords, we have, at p. 348, of the same volume, another instance, of an election of a bishop of Rochester, and his confirmation by the archbishop, "præmisâ legitimâ examinatione super electione." And again, at p. 357, we find another case, more at length, where the proceedings are stated. It is in the history of the church of Rochester, "*Historia Roffensis*." There it says, "*Præsentatus fuit idem electus Waltero Cantuariensi archiepiscopo apud Lambeth, ut patrono, et 11 Cal. April. admissus ab eodem; et datus fuit dies opponere volentibus ad comparandum ubicumque 13 Cal. Maii. Quo die adveniente, in capellâ de Lambeth, et nullo oppositore comparente, pronuntiata electione per M. Andream de Bregge, Fratribusque J. de Westerham Monacho, et G. de Mepeham Sacristâ, productis et juratis ad instruendum officium, datus fuit dies iv. Non. Maii ad audiendam pronuntiationem productorum. Quo die adveniente, dicto electo comparente, et confirmationem suæ electionis petente, respondit Archiepiscopus, quoddam ligatâ fuerunt manus ejus, et quoddam non potuit ulterius procedere, quia Papa provisionem Ecclesiæ Roffensis ad opus Fratris Johannis de Puteolis Gallici, Confessoris Dominæ Reginæ, reservavit.*" So that the archbishop was merely stopped by the Pope, and the account is then given of the proceedings which followed upon this. Then again at page 417, in the history by one of the monks of Norwich, of some of the bishops of that see, it is stated, that in the year 1416, John Wakeryng was made bishop of Norwich, during the schism in the papacy. "*Cujus promotionis tempore schisma quasi generale fuit in ecclesiâ. Tres enim regnaverunt Antipapæ. Et igitur ne regnum Angliæ cuiquam schismatico in aliquo confaveret, electus prædictus per Henricum Chichele Cantuariæ Archiepræsulem confirmatus et consecratus fuit, sub Rege Henrico 5.*" So that there the archbishop interferes, and confirms the bishop, in consequence of there being a schism in the papacy.

Mr. Justice ERLE. Does not that intimate that the Pope was the proper person to confirm; and, there being three Anti-Popes, could the archbishop of Canterbury, on account of that special circumstances, confirm?

Mr. *Badeley*. But it seems, my lord, the Pope had previously usurped the power of the confirmation of bishops generally in England. I shall have occasion presently to refer your lordships to some matters with respect to that, which will explain the circumstances under which this power devolved on the archbishop.

Now in the same volume, at p. 531, in the account of the bishops of Worcester, we have this statement: "*Mortuo Godefrido Giffard, Monachi Wigorniensis e cœtu proprio elegerunt virum optimum Johannem de S. Germano, 1302, 25 Martii. Electionem Rex Edwardus dato assensu die 7 Aprilis confirmavit.*" The crown confirmed the election. "*Archiepiscopo autem confirmationem suam denegante, Romam itum est.*" The archbishop therefore was not considered to be bound by the confirmation of the crown, or by the

assent of the crown. The archbishop took his own course: he refused to confirm the election, as in the previous case to which I referred your lordships. "Lite adhuc pendente, electus in curiâ Romanâ præsens, seu moræ impatiens seu Papæ voluntati obsecundans, juri suo cessit." And so the matter ended. But that is evidence from which your lordships may see that the right claimed by the archbishop at that time was actually exercised by him in this, as in the other case; the discussion and the controversy being the cause of an appeal to Rome.

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So again, my lords, as to the church of Ely, at p. 631 of the same volume, we have an account of bishop Ridel, by one of the monks of Ely. This was very early in the history of that church, for it was soon after the death of Thomas A'Beckett. Galfridus Ridel was elected, he being archdeacon of Canterbury. "Hic enim cum a Monachis Elyensibus fuisset electus, et in communi audientiâ purgâset innocentiam suam, quòd mortem S. Thomæ Archiepiscopi neque verbo neque facto neque scripto scienter procuravit, in die Ascensionis in ecclesiâ suâ solemmniter intronizatus." That is a remarkable instance, as showing that the party was open to reproach, or to scandal, of certain charges, and that in order to qualify himself for consecration, or for the confirmation of his election, he was bound to clear himself from those charges, and that he did that apparently in the canonical manner, by the canonical purgation.

Well, then again, my lords, in the same volume, at p. 637, at a later period we have one Hugo De Balsham elected bishop of the same church of Ely. "Ipse fuit electus a Monachis Elyensibus, Idibus Novembris, anno Domini mclvi, anno regni regis Henrici xl. Sed quòd tam a rege Henrico, quam ab Archiepiscopo Bonifacio Cantuariensi, cassata fuit sua electio, ad curiam Romanam appellavit." There the crown and the archbishop seem to have gone together. Then there was the appeal to Rome, "ubi fuit confirmatus," and he was made bishop of Ely.

At p. 640, my lords, there is another instance to the same effect, the instance of Robert Orforde, who was elected bishop of Ely, in 1302. "Publicatâ ejus electione, ac cæteris dictam electionem concernentibus peractis, deducta est causa illius electionis, coram domino Roberto Cantuariæ Archiepiscopo examinanda, tam de formâ electionis, quam de personâ electi."—It is remarkable to see how this history bears out and tallies with the rule and principle of the canon law.—"Die itaque statuto ad procedendum examinationi electionis et electi, Dominus Archiepiscopus multum se reddebat difficilem erga electionem pariter et electum, objiciens sibi minus sufficientem literaturam, et quantum ad ipsum pertinebat, dictam cassabat electionem; Ob quam causam dictus electus ad curiam appellavit Romanam. Unde Cantuariensis ecclesia in excellenti suâ potestate et præeminenti dignitate, propter nimium Pontificis rigorem, est maxime vulnerata. Nam, ante istius causæ devolutionem ad curiam Romanam per interpositam appellationem, Dominus Cantuariensis, cassare poterat et conferre dignitatem. Nunc autem cassare potest, conferre nequaquam, quoniam curiæ jam reservatur Romanæ, et inter causas majores reputatur." So

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that there we have the authority of the metropolitan, the archbishop of Canterbury, distinctly recognised; a curious history of an election precisely according to the rules of the canon law; an appeal from that to Rome; and still the assertion of the right of the archbishop of Canterbury "*cassare electionem*."

My lords, in that part which relates to the history of the church of Durham, you have a number of instances to the same effect: in almost each of them there is a reference to the confirmation of the bishop by the metropolitan; and in many of them the clearest proof that the discretion of the archbishop was exercised, and the confirmation itself carried on, precisely in the form, and in the manner, and under the circumstances required by the canon law. At p. 719, mention is made of bishop Hugh, whose election appears to have been disputed by the archbishop of York and others: "*Dicebant enim electionem sine consensu metropolitani factam irritandam, et inter ea quæ sacrorum canonum disciplinam non prætendunt puniendam*;" the archbishop thus asserting his metropolitan rights.

At p. 732, one Morgan, "*electus in episcopum Dunelniensem per monachos ejusdem ecclesiæ, curiam Romanam adiit, ut munus consecrationis ibi reciperet*." There was an objection there.

Mr. Justice COLERIDGE. That was done at Rome?

Mr. Badeley. Yes, my lord. Then, in p. 735, there is another instance of a person who appears to have been examined at very considerable length, prior to, or in the course of, his confirmation. The Pope, it seems, "*cassavit electionem Cantuariensis de quodam monacho, W. nomine. Objecerunt enim episcopi Angliæ tam contra electionem quam contra personam electi. Quam objectionis causam executi sunt in curiâ Lichefeldensis et Roffensis Episcopi, et Archidiaconus Bedfordensis. Requisitus etiam electus prædictus, utrum Dominus in carne vel sine carne descendit, malè respondit*." The account goes on to show that he was subjected to a considerable theological examination; something like theses or themes were set him; and he was rejected ultimately, as being deficient in qualification.

My lords, in another case of the bishoprick of Durham, at p. 736, there is the election of Thomas de Melsanby. "*Publicatâ igitur electione clero et populo, Magister W. Crispyn pro jure electionis et electi provocavit et appellavit. Super quâ electione factâ missæ sunt literæ patentes Archiepiscopo Eboracensi et domino regi*." And then it recites various objections made against the man by the king. There is a reference to the canon law there: for the objections are many of them taken from that law, and of a very curious nature. They are discussed before the Archbishop of York. "*Diu super exceptionibus antedictis coram Waltero Gray Archiepiscopo Eboracensi litigabant*:" the archbishop being thus admitted to be the proper judge of the fitness or unfitness of the bishop elect, and ultimately the case is referred to the papal court.

Then again, at p. 755, there is another instance before the Archbishop of York, in the case of Richard de Kellaw, who was elected bishop of Durham. "*Præsentantur electus et electio Archiepiscopo Eboracensi apud Novum Burgum (Newcastle) die Aprilis xix. Examinantur apud Hextildesham ab eodem archiepiscopo,*

iv die mensis Maii. Citantur omnes electioni vel electo objicere volentes; quòd compareant coram eodem archiepiscopo."

Mr. Justice COLERIDGE. Does it say where that is?

Mr. *Badeley*. I suppose Hexham is the place—"Hextildesham," as it is put. I suppose it means Hexham.—"Citantur omnes electioni vel electo objicere volentes, quòd compareant coram eodem archiepiscopo apud Brynston x die ejusdum mensis. Et nullo ibi comparente, in crastino apud Riptoun confirmatur electus."

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My lords, I believe in the same volume many more might be found, if I had the time to search for them, or your lordships the time to listen to them. But that being a book of very considerable reputation, and a collection of the earliest writers, these instances furnish their contemporary testimony to what was done at confirmations, and to the manner in which the archbishop of each province from time to time proceeded on those occasions; proving his right, and the exercise of his right, to annul the election if the "*persona electi*" was not qualified, and did not come up to his ideas of what the man ought to have been. They show also most distinctly, my lords, that by the "*persona electi*" is to be understood not merely identity of person, but the person himself, in his character, his qualities, his habits, and his age. That, my lords, beyond all question, was the rule generally. It is perfectly clear that it was the rule prevailing throughout England, both in the province of Canterbury, and in the province of York; that the rights of the archbishop were adhered to, and exercised from time to time, exercised according to the rules of the canon law; and that the metropolitan followed out, in the process which he took, the terms, and the manner, and style of the canon law.

Meaning of "*persona electi*."

Now, my lords, I submit that that is sufficient evidence of what was the practice in this country, and of its having prevailed without interruption for a very long period. But afterwards it seems that the authority of the Pope interfered; and, whether it was by provisions, or through appeals, or by what other means, he succeeded in taking very much into his own hands the business of confirmation. Perhaps it might be under a colour of right of no inconsiderable strength, he being in fact the Patriarch of the West, and recognised in that character universally, and having originally sent St. Augustine into this country, and therefore claiming naturally a sort of jurisdiction and authority over the archbishops of Canterbury from that time; and his supremacy being always allowed or submitted to by the church of England. By one means or another, he certainly had already obtained the right or the power under consideration, in the reign of Edward 3; for in the Year Books I find a reference to the subject (in 41 Edw. 3, 5 B.); from which it appears that it was then the business, and the practice of the Pope (at least one may infer so much), to examine, and to do that which the archbishop of Canterbury had previously done here. There was a transfer to him of the archiepiscopal rights, and the archiepiscopal practice of investigation. The words of the Year Books are, (the question being as to the time when a person became bishop, and when a lease made by him would take effect): "Si un soit eslie un Evesque, ses benefices

Usurpation by the Pope of the power of confirmation.

Year Books,
41 Edw. 3,
5 B.

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ne sont pas voides, tanque il soit consecrate, et si le Roy grant ses temporalities a luy, et les benefices se voident, apres per son creation le Roy n'avera my le presentment." Then Belknap says: "Sir, vous dits verity, mes il n'est pas semblable; car tout soit il eslie, il covient estre *confirme del Pape, et poit estre, que le Pape luy voet refuser per non ability ou autrement.*" The Pope therefore was to confirm him, and so might refuse him for non-ability or for other cause. And when the Pope determined and settled that he was to be a bishop, the objections were to be at an end. I believe the Year Books might furnish additional evidence to the same effect. The Pope at that time seems to have superseded in a great measure the provincial metropolitan.

Rot. Parl.
3 Hen. 5:
enactment re-
lating to the
confirmation of
bishops.

I would now call your lordships' attention to a very curious document which exists upon the rolls of parliament, and directly bears upon this subject. It had the force of an act of parliament, and was an act of parliament, for it is expressly stated to be made by the authority of the crown and the two houses of parliament. It is an act, or an ordinance, with respect to the confirmation of bishops. It is in the fourth volume of the Rolls of Parliament, p. 71, in the third year of Henry 5. It recites, (and I will translate as I go on, for the French is so old and antiquated that I should not be intelligible if I read it in that language), "that our lord the king having consideration for the long voidance of the apostolic see by the damnable schism which has so long endured in holy church, and as to which he does not know how long it may endure, and how certain cathedral churches within the realm, which are of the foundation of his noble progenitors, and of his patronage, have been already deprived and are still destitute of pastoral government, because the persons chosen to them cannot be confirmed for default of apostolic authority, to the great diminution of divine service in the said churches, subtraction of hospitality, and great peril of the souls of many, to the devastation and destruction of the seignories and possessions of the sees, and the impoverishment of the said churches; and how by possibility in such manner the cathedral churches in this realm may all become void, and so become destitute of government, and the king and his realm may become destitute of the counsel and comfort and advantage that they ought to have from the prelacy; and considering how in many parts abroad since the voidance of the said see," (that is the apostolic see,) "many confirmations have been made and are made from day to day by the metropolitans of those places, as he is credibly informed, and wishing to provide a remedy for the mischiefs that exist: the king wills and ordains, on the full and deliberate advice and consent of the lords and commons of this realm, being in this present parliament, that the persons already elected and to be elected within this realm, during the voidance of the apostolic see, shall be confirmed by the metropolitans of the places, without excuse or other delay in that respect; and that the writs of the king, if necessary, shall be addressed to the said metropolitans charging them strictly to perform the said confirmations, and all that which belongs to their office, and that the bishops elected shall effectually pursue or prosecute before them their said confir-

mations, so that no damage or prejudice might arise, by default either of the metropolitans or of the elected bishops, to our lord the king, or to his realm, or to the said churches; which God forbid."

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Now that, my lords, is certainly a most remarkable document. It is remarkable and valuable on many accounts. It shows of course that, in the absence of the Pope, it was the duty of the metropolitans to confirm. It is a recognition of the old practice in that respect. And it shows also what value and what importance were attached, at that time, according to the whole language of this statute, and the judgment of the legislature, to the business of confirmation; that in the absence of confirmation, and in consequence of the inability to procure it, by reason of the schism which then existed in the papacy, the churches were left destitute, their possessions were in peril, or actually destroyed, and the whole realm was more or less suffering; and all for what? For want of confirmation of the bishops. Nothing can declare more strongly the opinion then entertained of this ceremony, and the necessity of having it duly and legally performed. It shows also that what the archbishop had originally performed, the Pope had acquired the legal right of doing in such case; and that, when the authority then recognised had failed, the evils were so great that it was necessary to provide a remedy for them; and the remedy was, to pass an act, especially providing for the confirmation during the vacancy of the apostolic see by the metropolitan of the province; to restore, in short, the ancient practice.

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My lords, that statute was followed by certain writs which were issued by the crown; and I find that in the year 1416, (this statute having been passed in the year preceding), the crown issued its writ, wherein it recited the provisions of this statute, and directed the confirmation of a bishop accordingly. You will see this writ, my lords, in the fourth volume of *Rymer's Fœdera*, the second part, p. 156, of the edition which I have here. It is directed by the crown, that is, by King Henry 5, to one John Wakeryng, who was Archdeacon of Canterbury, and had been elected bishop of Norwich, and who was the same person who was mentioned in one of the passages which I have read from *Wharton's Anglia Sacra* (r), and who was there stated to have been confirmed by Archbishop Chicheley. The writ recites that he, the archdeacon, had been elected to the bishoprick of Norwich, and then it sets out the statute to which I have just referred, and adopts the language of that statute in stating the object of the writ. It then proceeds thus: "Et ideo vobis mandamus, districtius quo possumus injungentes, quod ad confirmationem vestram, virtute electionis de vobis, ut præmittitur, factæ, absque dilatione seu excusatione aliquali, efficaciter prosequamini, juxta formam et effectum voluntatis, ordinationis, et acti supradictorum, sub periculo quod incumbit, ne, pro defectu vestri, dampnum vel præjudicium nobis aut regno nostro, seu ecclesiæ prædictæ, occasione dilationis hujusmodi, eveniat quovis modo." Then follows another writ, from the crown to the archbishop of Canterbury, which recites the king's assent to the election of this John Wakeryng

Writs of the
crown for the
confirmation of
bishops, follow-
ing upon that
enactment.

Rymer's
Fœdera.

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The observance
of the rules of
the canon law
implied in that
statute and
those writs.

Lyndwood.

The same
holds with re-
spect to the
stat. 25 Hen. 8,
and the writs
founded upon
it.

Value and im-
portance at-
tached to
confirmation, in
the time of
Hen. 5.

Evidence of the
continued ex-

to the bishoprick of Norwich, and then concludes thus: "Et ideo vobis mandamus quòd ad confirmationem præfati clerici nostri, virtute electionis sibi, ut præmittitur, factæ, absque excusatione seu dilatione aliquali, procedatis, ac cætera omnia quæ vestro canonicè incumbunt officio, in hac parte, peragatis et exequamini, juxta formam et effectum voluntatis, ordinationis, et acti supradictorum. Ita quòd in vestri defectum damnum, vel præjudicium, &c." So that there, my lords, we have the following out of that statute by writs actually issued by the crown. You have the writ issued to the archbishop, very much in the same form as is retained at the present day; very much in the same form as is retained in the time of Henry 8. You have the statute requiring that all this shall be done "*without any excuse or delay.*" And you have the writs, founded upon that statute, also requiring that the confirmation should be performed without delay. But yet, absolute and peremptory as both the statute and the writs are, there is no pretence for saying that the confirmation was not to be according to the rules of the canon law. On the contrary, the observance of those rules seems to be distinctly implied. It was directed to the archbishop; he was undoubtedly bound by the canon law; the canon law with respect to elections was undoubtedly then in force here; for at the very period at which this writ was issued, Lyndwood was actually living: it was about this time that he published, or at least was engaged in writing, his work on the ecclesiastical law of this country. Looking therefore at the statute itself, the form of the statute, and the writs, and comparing these with the statute of Henry 8, and the writs founded upon it, I should be glad to know why a more stringent operation is to be given now to the statute of Henry 8, and to the writs founded upon it, than was given, in connection with the established and recognised law of the land at that time, to the statute of Henry 5, and to the writs which were founded upon that? If, imperative and urgent as the statute and the writs of Henry 5 undoubtedly were, (and they were much the same as those of Henry 8,) they still did not exclude the rights of the metropolitan, but allowed that full inquiry upon confirmation which the canon law authorized and required, why is the statute of Henry 8, and the writs founded upon it, to exclude those rights, or prevent the same inquiry? This is a question which I shall be glad to have answered by my learned friends on the other side, and which must be answered satisfactorily before this rule can be discharged. I shall have occasion to refer to this hereafter, when I am looking more particularly to the statute of Henry 8. But I now refer your lordships to the statute of Henry 5, and the writs which I have just cited, in order to show the value and importance which were attached at that time to the act of confirmation, and its necessity, as then practised, for constituting a person bishop at all; the jurisdiction and judicial power which the metropolitan had in it being at that period undisputed. And if, notwithstanding this statute, the archbishop was bound to proceed according to the rules of the canon law, and entitled to make a full judicial inquiry, it furnishes a most important argument in support of the rule in this case.

So that, my lords, we have evidence of the strongest kind, and

from the earliest period, of the power of the metropolitan generally and of the necessity of confirmation, and, in that confirmation, of a full investigation of the *persona electi* as well as of the election. We have this practice brought into this country, and existing here, for centuries prior to the period of the Reformation. We have proof of its being actually in force, "*in viridi observantiâ*," being continued on from year to year, and from age to age, by a succession of instances which occur in contemporaneous histories, after the Pope had taken it into his own hands; and when there was a schism in the papacy, we have it restored to the metropolitan, we have the metropolitan exercising it, and being forced to exercise it, under statute, and under writs of the crown, but still forced to execute it, subject to the rules of the canon law, subject of course to that discretion which was vested in him by that law, and by the early discipline of the church.

So, my lords, undoubtedly matters went on, until the period of the Reformation. And thus your lordships see that from this practice, thus established by law, the term "confirmation" had acquired from the first a recognized legal meaning. It was a term of art; it had a particular sense, a technical meaning in the English law; it involved in legal acceptation a peculiar process, certain forms to be gone through, and certain investigations to be made: just as a fine, or a recovery, or a *scire facias* has a particular legal sense, and requires regular and formal proceedings. And therefore, if we find this term adopted in a statute passed at the period of the Reformation, or at any other period, and used in writs and legal documents, there can be no doubt that it must be understood in that legal sense which it had acquired, and that it must carry with it all that force and all those attributes which belong to it by law.

But, my lords, before I pass to the period of the Reformation, and consider the provisions of the statute of Henry 8, I would refer your lordships, in connection with the duties and powers of the metropolitan in the examination of bishops, and his discretion in the business of confirmation, to a work on the subject of the ancient rites and liturgies of the church. It is "*Martene De Antiquis Ecclesiæ Ritibus*;" a book of considerable authority and extremely valuable. It is a work of most extensive learning, and refers to some of the oldest rituals and ordinals of the church of this country, as well as of others. And in part of the treatise, in the first book, chapter 8, there is a passage which I will beg leave to read, as supporting generally what I have already stated. It says, "*Interim certior reddebatur metropolitanus de obitu præcedentis episcopi*,"—

Mr. Justice COLERIDGE. What is the date of this book?

Mr. *Badeley*. About two centuries ago, my lord. There are two volumes in one bound up in this edition. It is the second volume, p. 25, of the Venice edition of 1783. Martene was a very learned canonist and theologian.

Mr. *Waddington*. A Benedictine.

Mr. *Badeley*. He was a Benedictine monk. "*Interim certior reddebatur metropolitanus de obitu præcedentis episcopi, requirebaturque ejus consensus ad procedendum canonicè ad successoris electionem*." First, there was the archbishop's consent to the election. "*Tantaque erat sedis metropolitana in electionibus*

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istence of the metropolitan's power of inquiry, down to that period.

Recognized legal meaning of the term "confirmation," anterior to and at the period of the Reformation.

Martene *De Antiq. Eccl. Rit.*; showing the general practice of the Western Church.

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episcoporum auctoritas, ut defuncto archiepiscopo, atque, ut aiunt, sede vacante, capituli consensus postularetur, tum ad substituendum successorem, tum ad confirmandam episcoporum suffraganeorum electionem." Then he cites a great number of authorities to this effect. Then, my lords, afterwards he says, under the head of "*Decreti et electi examen*," "Exhibitum sibi electionis decretum, una cum electo, ante consecrationem examinabat metropolitanus. Eo in examine primum perquirebat an canonica foret electio; deinde ipsius electi mores discutebantur, ac fides; quapropter perlecto examinatoque decreto proferebatur Gregorii Magni pastoralis libellus, quem tanquam unam et perfectam omnium pastorum regulam conspiciabant; ex eoque lectis capitulis nonnullis, interrogabatur electus, utrum eam sibi regulam servandam proponeret, secundum quam et vivere et docere vellet." You have here from oldest times the general practice of the Western church, the metropolitan's examination of the election and the elected; of his character, his conduct, and his faith. You see the bishop elect regularly instructed in his duty by the metropolitan, and the oath and the promise obtained from him, that he would adhere to the rules and regulations of the church. This is followed out, my lords, at considerable length, and then the book shows how the examination was extended to the various heresies which existed at that day, in order to ascertain that the person elected was free from them, and that he would engage to abstain from and avoid such things during the rest of his life. Then there was a promise of obedience, and various ceremonies which were observed in the actual consecration of the bishop afterwards. The confirmation of the bishop however was prior and preliminary to the consecration, and was solely subject to the discretion of the metropolitan, who was governed by the rules of the canon law, as based upon the ancient canons; and he acted, as is manifest, judicially, as well upon the fitness of the person, as upon the merits or demerits of the election. Martene thus shows what had been and what was the practice generally in the Western church. And he corroborates what he says, by adducing a large and interesting collection of ancient liturgies, which are all to the same effect, and in many of which the form is given in which the man is to be more particularly examined in respect of his faith. And thus, my lords, I think we have abundant evidence not only of what was the rule of the church, and of ecclesiastical law, but how it was observed, both here and elsewhere, during the whole period prior to the Reformation. I am not aware of any thing which indicates the slightest alteration up to that time. And then came the statute of Henry 8, which is said to have introduced such great alterations in this matter.

Object of stat.
25 Hen. 8,
c. 20.

Now, my lords, the merits of the question, with reference to the principal provisions of this statute, have been pretty fully discussed by my learned friends. But I must be permitted to observe, that I think it must be clear to any person, who looks carefully at this statute, and its general purview, that its object was solely to destroy the power of the Pope in this country; that it was entirely directed against Rome, and Roman interference; that it aimed at nothing but that, and its enactments from beginning to end speak the same language. Look, my lords, at its title; and though the title may

Title of the act.

not be of much value, yet I have the high authority of this court, of my lord *Denman's* judgment in the case of *Hinton v. Dibbin*, (which is in 2nd *Queen's Bench Reports*, p. 646), that "the title of a statute is not to be disregarded in putting a construction upon it." The title here would seem to be to the effect which I have stated; it being, "an act for the non-payment of first fruits to the bishop of Rome." The object therefore of this statute, so far as the title discloses it, was to destroy the power of Rome.

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LORD DENMAN. Have you looked to the roll of parliament? Because I mentioned the other day that the title in *Gibson* is different(s).

MR. BADELEY. I was going to state, my lords, that that is the title which appears in the general collection of the statutes. I have referred to *The Statutes of the Realm*, which were taken, I believe, entirely from the rolls of parliament; and there, the title of the act is, "An Acte restraynyng the payment of Annates, &c."

THE ATTORNEY GENERAL. There is some other title I believe in the reviving statute (t).

MR. BADELEY. I was not aware of that; but, my lords, I apprehend that that will not make much difference.

THE SOLICITOR GENERAL. The reviving statute of Elizabeth gives it another title.

LORD DENMAN. What was the period of the statute mentioned in *Hinton v. Dibbin*(v)? Because we know that of late years the title is really the act of the legislature, but in those old times I do not think there was much in the title.

MR. BADELEY. It was a modern statute, I believe, which your lordship referred to; but you stated then that the title was not to be disregarded. I do not put much value upon that; I merely take it as a circumstance, being the first that occurs in noticing the statute at all. Whether it has the one title, or whether it has the other, it is pretty clear that whoever put either title considered that the general purview of the statute, the intent of it, was to check the power and authority of the Pope. However, my lords, without resting upon the title, the preamble is much more to the purpose. The preamble is entirely made up of a statute passed in restraint of the powers and authority of the Roman see; it recites nearly the whole of that statute, and adopts it as its basis. Now it is stated, my lords, in *Bacon's Abridgment*, tit. "Statute," I., that "It is in the general true, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs which are intended to be remedied by the statute." The words there are general. Then, my lords, there is a passage in *Stowell v. Zouch*, in *Plowden*, 369, to the same effect, showing the great value which is to be attached, in the construction of a statute, to the preamble of the statute.

Preamble of the stat.

Bac. Abr.

Stowell v. Zouch.

Then, my lords, look at the several sections of the act in question. Every single section may be read, and ought to be read, and must

Reference to Rome throughout the act.

(s) *Supra*, p. 192.

(t) 1 Eliz. c. 1, s. 7; where the title given to it is, "An Act Restraining the Payment of Annates or First Fruits to the Bishop of Rome, and of

the Electing and Consecrating of Archbishops and Bishops within this Realm."

(v) 11 Geo. 4, and 1 Win. 4, c. 68.

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be read, more or less, as bearing upon Rome. Each of the first five sections expressly enacts certain things which are to be done, and the manner of doing them, without resorting to Rome, and without obtaining bulls from the Pope; and those sections, I submit, cannot be read, so as to make sense of them, separately from the portions relating to the papal authority. The fourth section, indeed, does not mention Rome expressly; but it is clearly carrying out the object which has been previously stated in the third section; and that object being to have the bishops of this country regularly made and consecrated without any bulls or authority from Rome, the fourth section goes on to provide how the archbishop on the one hand, and how the crown on the other, are to carry out that; each being directed to exercise his own proper part in that matter. Then comes the fifth section, which makes express mention of the see of Rome, and is directed particularly against the obtaining of palls, or any other benedictions, or bulls, or mandate from that quarter. And that fifth section particularly prescribes the letters patent which are to be issued by the crown; and it would seem almost as if the letters patent themselves, which are to be so issued, would not be good, and might be objected to as invalid, if they did not upon the face of them, and in terms, refer to Rome, and expressly require the parties to do whatever is to be done without obtaining bulls from Rome, or without resorting to the holy see; for the words are, "That the king's highness, by his letters patents under his great seal, shall signify the said election to the archbishop and metropolitan of the province," and so on, "requiring and commanding such archbishop to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same, without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome for the same in any behalf." Therefore it would seem, that those latter words are part of the directions to the archbishop which the statute requires to be introduced into the letters patent; the injunction to the archbishop not being merely that he is to confirm, not merely that he is to consecrate, but that he is to confirm and consecrate in a particular manner, that is, "without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome." It is impossible to read that sentence correctly without these latter words, or to allow that the mandate to the archbishop is complete, unless it contains this prohibition.

Then, my lords, the sixth section is to the same effect; which, though it does not mention Rome expressly, yet speaks of persons "being chosen, elected, &c., according to the form, tenor, and effect of this present act;" so that it is necessary, therefore, to refer back to the enactments of the previous section, which relate expressly to Rome, in order to construe this section. The two sections, therefore, must be read as one, each section either referring expressly to Rome, or so referring to, and incorporated with one that does, that it cannot be understood without it.

So much for the first six sections, my lords. Then as to the seventh, which is the section which relates to *præmunire*, whether that is at

this moment in force at all, may be a question; but it is quite evident that it must be read in close connexion with the rest of the statute, and that it throws light upon the statute, as one levelled solely against Rome. Now the only purpose of this seventh section is to enforce the previous enactments; to compel the parties to do, or to restrain them from doing, that which they had previously been required to do or not to do. It enacts certain pains and penalties: what are these pains and penalties? Those of the statutes of *præmunire*. But, as the law then stood, *præmunire* had only reference to offences connected with Rome. There was no offence or penalty at that time in existence, which was called *præmunire*, but what concerned more or less the introduction or maintenance of the papal authority in this kingdom. The penalties of *præmunire* had not then been extended further. And therefore, in enacting that certain parties are to do or not to do certain things, in such a manner as may preclude all connexion with Rome, if those enactments are vindicated at last by that which was a penalty only known to the law as a penalty directed against offences relating to the Roman see, it seems to throw at least additional light upon the true construction of the statute, and leads us still more confidently to say, that the only object of the framers of it was to check the Roman authority, and that it was not intended for any other purpose, or to interfere with any other law.

It is remarkable, my lords, I think, that in one or two authorities, this statute is merely referred to as a statute directed against the authority of the see of Rome. In Lord *Hale's Pleas of the Crown*, the first volume, p. 75, he refers to the statute; and he refers to it solely as restoring the supremacy of the crown, and repressing the authority of the Pope: he does not reckon up amongst the offences of *præmunire* the case of an archbishop refusing to confirm according to this act. And with reference to this penalty of *præmunire*, I may observe incidentally, for the relief of those who seem to be terrified by it, that the clause of the statute which enacts it may be deemed to be no longer in force. It is another thing to say that the enactment which requires the archbishop to confirm and consecrate, (of course, unless he has any lawful objection,) is one upon which an indictment might be founded. That is quite another question. But there is reason for supposing that the penalty of *præmunire*, contained in the statute of the 25th of Henry 8, c. 20, is no longer in force. That statute, as your lordships are aware, was repealed in the time of Queen Mary; it was revived afterwards by the statute of the 1st of Elizabeth; but, in one of the clauses of that statute, there is an express reservation of those provisions which relate to *præmunire*. The clause of the statute is the 32nd section of the first of Elizabeth, c. 1; and in that section there is a proviso which has been thought to affect that very penalty of *præmunire* in the statute of Henry 8. It says, "Provided always, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, shall not in anywise extend to repeal any clause, matter, or sentence contained or specified in the said act of repeal made in the said first and second years of the reigns of the late King Philip and Queen Mary, as doth in anywise touch or concern any matter or cause of

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Præmunire had then reference solely to Rome.

View of the stat. taken in Hale's Pleas of the Crown.

The penalty of *præmunire* contained in the stat. no longer in force.

1 Eliz. c. 1, s. 32.

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Lord Bacon :
" Offences of
Præmunire."

præmunire, or that doth make or ordain any matter or cause to be within the case of *præmunire*; but that the same, for so much only as toucheth or concerneth any case or matter of *præmunire*, shall stand and remain in such force and effect, as the same was before the making of this act; anything in this act contained to the contrary in anywise notwithstanding." So that here is the statute of Elizabeth restoring the statute of Henry 8, which had been repealed by that of the 1st and 2nd of Philip and Mary, but making an express exception with regard to the subject of "any matter or cause of *præmunire*, or that doth make or ordain any matter or cause to be within the case of *præmunire*." That is declared not to be revived. So that it may be contended fairly, as this is the statute from which alone the statute of Henry 8 now dates and takes effect, that under that section which I have read, the penalties of *præmunire*, imposed by the statute of Henry 8, are now no longer in force. And in connexion with this question, as well as with that of the general object and bearing of the statute, I will venture to mention to your lordships that there is something like an authority in the works of no less a person than Lord Bacon, who enumerates, in a treatise of his, all the different cases of *præmunire* which he considered to be within the laws then in force. Your lordships will find the treatise in Lord Bacon's works, the quarto edition, by Mallett, the 2nd volume, p. 502. The title of the treatise is, "A preparation towards the union of the Laws of England and Scotland." And then, under the title, "*Offences of Præmunire*," he specifies all the cases which he understood to belong to it; and it is clear that he had the statute of Henry 8 under his consideration at that time; because he ranks under the offences of *præmunire* that of a dean and chapter in not electing as that statute requires. But he makes no mention of the archbishop's being liable to the penalties of *præmunire*, in case he omitted to confirm or consecrate: he says nothing at all about that. But he retains the provision respecting Rome: he retains all those provisions which were in force with reference to the authority of the court of Rome at that time. And from his direct reference to the case of the dean and chapter, and his omission altogether of the case of the archbishop, it would seem to be an authority of that most eminent of men, that in his view, at that time of day, the statute of Henry 8, so far as related to the offence of *præmunire* in the case of the archbishop, was at an end.

Mr. Justice COLERIDGE. How would you distinguish the operation of the statute, in the one case, and in the other?

The *Attorney General*. They are both in the same section.

Mr. Badeley. I see, my lord, that they are in the same section; that there is no other part of the act which does relate to the case of deans and chapters incurring the penalties of *præmunire*. Possibly this may have escaped my Lord Bacon's notice altogether; and there may be no distinction to be drawn between the penalties of *præmunire* in the one case and in the other; so that perhaps the authority of Lord Bacon upon this point amounts to little. But still, my lords, the question will remain, whether, by the statute of Elizabeth, and the effect of that clause to which I have called the

attention of your lordships, the penalties of the statute of Henry 8 generally, whether as to deans and chapters, or as to archbishops, or as to both, are not entirely at an end, so as to prevent any one party from incurring the punishment of *præmunire* by anything in that act, though liable perhaps to an indictment for wilfully disobeying it.

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Mr. Justice COLERIDGE. Then, if there is no distinction, you have Lord *Bacon's* authority against you, instead of for you.

Mr. *Badeley*. Why, my lord, I do not think it a question of any importance: my Lord *Bacon* may have thought that the statute, not looking very carefully at it, did apply to the case of deans and chapters, but did not affect the case of the archbishop. I was merely mentioning it as a curious thing that he does not refer to the case of an archbishop at all, while he does refer to that of a dean and chapter. Whether we can or cannot rely upon it as any evidence of what Lord *Bacon's* opinion was, it would be at best but negative evidence of his opinion (*w*). But still, putting that aside altogether, there is the statute of Elizabeth remaining upon the statute-book, with that proviso in it; and I submit it therefore to your lordships' consideration, whether, supposing the question of *præmunire* were expressly raised before your lordships, it might not be successfully contended, that, according to the mere bare construction of those two statutes, those penalties were at an end altogether.

The observations which I have just now taken the liberty of addressing to your lordships, with respect to the penalties of *præmunire*, were in a manner parenthetical; for I was referring your lordships to those penalties in connexion with the other provisions of the statute of Henry 8, in order to show, that being directed wholly and solely against the papal jurisdiction, no inference can be drawn from the act itself that, by the term "confirmation," anything more was intended than such a confirmation as should be entirely free from the interference of the see of Rome. That, my lords, is clearly the meaning of the act, as is evident from reading the act through, and looking at it as a whole. And if the act is considered historically, I think your lordships will see equally clearly that that was its only object, and that, therefore, any argument which is grounded upon any other circumstances is really of little weight. The statute was passed in the year 1533, just at the period when Henry 8 was wearied out with the delays and the refusal of the court of Rome in the matter of the divorce; when he was determined to wreak his vengeance upon the Pope; and, in order to do so, he caused this statute to be enacted, with others to the same effect. They were part of that scheme, which was then being followed out, for destroying altogether the Roman supremacy in this country. But there was no intention to do more, and no reason why more should be attempted. The king had no object at all in altering the recognized forms of the law: he had no other scheme in view than that of destroying the Roman power and preventing interference with his own authority. As to the forms which were observed in the ecclesiastical courts, he was perfectly content that those forms should be carried out in the usual way, and under the

The act con-
sidered histo-
rically.

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Stat 25 Hen.
8, c. 17; con-
tinuing the
operation of the
canon law in
this country.

Distinction
between the
general canon
law, and the
constitutions
and canons
mentioned in
that statute.

presidence of the archbishop: he knew, my lords, perfectly well, that he had in *Cranmer* an obsequious primate who was ready to accommodate himself to any caprice of his tyrannic will; and therefore, as for getting rid of any forms, or doing anything more than putting an end to the authority of the see of Rome, it was never in his contemplation; it was never an object which he could have thought of any value. And it is a remarkable thing, that one of the very statutes passed at the same time with this, the statute which immediately precedes it in the statute book, chapter 19 of the 25th of Henry 8, is the statute which expressly and in terms refers to the canons which were then in force, and continues their operation in this country. Now there can be no doubt that a portion of the canon law then in force was these very regulations with respect to the elections of bishops and their confirmations.

Mr. Justice ERLE. Does it not recite that a portion of the canons then in use was repugnant to the laws of England, and that therefore the whole should be revised, that those might be "abolite," in the words of the act?

Mr. *Badeley*. That expression, my lord, is solely in reference to some late canons which had been enacted by the clergy; and therefore that would not apply to the present rule.

Mr. Justice ERLE. I thought that the thirty-two commissioners were to revise the whole body of the canon law.

Mr. *Badeley*. Their authority, my lord, seems only to extend to those provincial and synodal constitutions and canons which had recently been enacted. But that authority was never carried out; and it is directed that, until they did this, until they fulfilled those trusts, and the powers which were given to them by this statute, the canons which were then in force should remain in force; and in force they have remained until this day. I do not admit that the general body of the canon law, or that portion of it to which I have referred before, stands upon the same footing as the constitutions and canons mentioned in the statute of the 25th of Henry 8, c. 19; for it seems to rest upon ground altogether distinct and independent, as part of the ancient ecclesiastical law of the realm, and therefore as part of the common law itself. It would therefore have operation and effect here by a prescriptive title, whatever became of this statute. But this very statute immediately precedes chapter 20, the statute which is now under our consideration. And I think, my lords, that forms a very strong argument indeed, as far as inferences can be raised, that the statute 25 Henry 8, c. 20, was not intended to do more than to destroy the authority of Rome, had no relation at all to any process of the courts, and was not intended in any manner to interfere with the confirmation by the archbishop.

Mr. Justice COLERIDGE. In point of fact, were the thirty-two commissioners ever appointed?

Mr. *Badeley*. I believe they were appointed, my lord; but they never did anything.

Lord DENMAN. There is a statute in Edw. 6th's reign, reciting that they had been appointed, and had done nothing; and there was a new set of commissioners (x).

Mr. *Badeley*. It was so, my lord. I believe the new commissioners, or some of them, did act: they prepared a sort of code (which was afterwards published), the "Reformatio Legum;" but it never became the ecclesiastical law of this country; and the English canons which were then in force have continued in force up to this time, by the operation of this statute of 25 Henry 8, c. 19. But I contend that the ancient body of the canon law is not affected at all by this statute, being part of the ancient ecclesiastical law of the realm, and therefore parcel of the common law, according to the doctrine of Lord *Hale*, and according to *Blackstone* also.

Then looking, my lords, at the statute of the 25 Henry 8, c. 20, looking at it generally as well as in detail, and looking at the history of the time, what is there to show that there is any meaning or effect to be given to the word "confirm," as you find it in the statute, different from what it had before? Now, my lords, undoubtedly there are various authorities which prove that when a statute makes use of a known term in the law, generally, it must be understood to use it in its legal sense, and according to its legal effect. I believe one of my learned friends has already drawn your lordships' attention to that point(y). That is the rule laid down in *Viner's Abridgment*, tit. *Statute*, E. 6; *Smith v. Harmon*, in 6 *Modern Reports*, 142; *Dwarris on Statutes*, pp. 765, and 766, where several instances are given; and *Bacon's Abridgment*, tit. *Statute*, I., p. 456. We know perfectly well that it would be so in any statute enacted at this time. Supposing the word "felony" was used, it would be construed of course according to its legal meaning. Or supposing that the words "tried and found guilty" were used, they would undoubtedly be held to mean "tried and found guilty by a jury;" a trial according to the course of the common law, carrying with it, and involving in it, all the rights of persons upon trial by jury, the rights of challenge, and all the various provisions that are made with respect to it. So again, with the term "heirs of the body," and innumerable others which might be adduced, and which are given as instances in the books of authority which I am citing. So that, as we have already arrived at the point that the word "confirm" meant a known legal process of investigation in the law, it having obtained, as I think I have shown your lordships, both from the canon law generally, and from the practice of the canon law as it prevailed here, and from the voice of the legislature in the statute of Henry 5, and the writs founded upon it, a known established use and meaning in the law of this country, its adoption by the statute of Henry 8, must imply that confirmation should be carried out according to its legal understanding and with its legal forms. And then, if so, of course, my lords, all that we have had before with reference to the duties of the metropolitan and his rights in the matter of confirmation, so far from being repealed or annulled by the statute of Henry 8, will have still greater effect given to them. For the archbishop is "required to confirm," required of course to confirm according to law; and if so, to confirm judicially, to act judicially, to allow the parties to appear before him, to enter into those investigations which the rules of the

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Ancient canon law not effected by that statute.

No new meaning given to the word "confirm" by stat. 25 Hen. 8, c. 20.

Vin. Abr.

Smith v. Harmon.

Dwarris on Statutes.

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No greater
effect to be
given to the
stat. of Hen. 8,
than to the stat.
of Hen. 5.

canon law, the ecclesiastical law of this realm, demand. If there was any intention of any other meaning in the statute, how was it that it was not expressed? If confirmation was done away with altogether, how was it that this was not enacted? But instead of its being enacted, it is left there; the known legal term is used by the legislature; and it is used just as in the previous statute of Henry 5, where provision was made with respect to the metropolitan's confirming.

Now, my lords, if, as we know, no other interpretation was given to the statute of Henry 5, and to the writs which were founded upon it; if under them the archbishop was required to confirm with all due celerity, and to do everything, almost in the words in which the statute of Henry 8 requires him; how is it, (for I must repeat a question which I have already asked) that a greater effect is to be given to the statute of Henry 8, than was previously given to the statute of Henry 5? Why is the one to be regarded as more imperative upon the archbishop than the other? Why is the archbishop's power to be considered as interfered with in the one case more than in the other? There is in substance no real difference between the statute of Henry 5, and that of Henry 8, in the direction that the archbishop shall confirm, except that the latter statute requires that he shall do so without bulls or mandates from Rome. That is the only substantial distinction. For as to his being required to confirm within twenty days, that of course only means that he shall not delay or put off proceeding to that business longer; that he shall commence it within twenty days; as the statute of Henry 5 enjoined that he should confirm "without excuse or other delay in that respect." The one merely fixes a particular time for that which the other peremptorily enjoined to be done immediately. Under each of these statutes it seems equally clear that the confirmation itself, the thing required to be done, was left precisely as it had stood before, a valid, substantial, judicial investigation before the archbishop himself, or his deputy, to ascertain the character, the conduct, and fitness of the person who was to be promoted to a bishoprick.

Now it is remarkable, my lords, that in the forms of writs issued by the crown afterwards there seems to be no perceptible difference.

Writs under
the stat. of
Henry 5.

Mr. Justice COLERIDGE. Before you go to that, I did not catch whether there is anything equivalent in the writs under the statute of Henry 5?

Mr. *Badeley*. Yes, my lord: the writ which I cited (z) under the statute of Henry 5, is very much in the same form as that which was adopted under the statute of Henry 8. The writ under the statute of Henry 5 recites, "Cum nos nuper electioni, nuper factæ in ecclesiâ cathedrali Sanctæ Trinitatis Norwici, de dilecto clerico nostro, Johanne Wakeryng, Archidiacono Cantuariensi, in Episcopum loci illius, regium assensum adhibuerimus, et favorem;"—it then recites the statute itself; then it goes on,—“et ideo vobis mandamus, quòd ad confirmationem præfati clerici nostri, virtute electionis, sibi, ut præmittitur, factæ, absque excusatione, seu dilatione aliquali,

procedatis, ac cætera omnia quæ vestro canonicè incumbunt officio, in hac parte, peragatis et exequimini, juxta formam et effectum voluntatis, ordinationis, et acti supradictorum." Now the forms that were used in Elizabeth's time are almost all the same; "mandantes,"—and so on,—"cæteraque omnia et singula peragere quæ vestro in eâ parte incumbent officio pastorali, juxta formam statutorum in eâ parte editorum et provisorum velitis cum effectu" (a). So that, there, my lords, the words are very much the same, both since the statute of Henry 8, and prior to the statute of Henry 8: you have a distinct reference to the "pastorale officium," to the duty and authority of the archbishop in his character of chief pastor of the church; one of the peculiar functions and duties of such pastor being, to ascertain and satisfy himself of the characters and qualities of the persons who were to be ordained by him. I think, my lords, there cannot be more clear proof, in following out this statute, that that was the view and intention of all parties,—of the legislature, and of the crown,—that nothing more was intended; and that all the provisions which made it imperative upon the archbishop to confirm, meant only to make it imperative upon him to confirm without reference to Rome.

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Form of the writs in Elizabeth's reign.

The same forms, my lords, as I have just read, (for I have looked into *Rymer* to find them), occur afterwards, and seem to have been continued, in the time of James 1, and Charles 1. Your lordships will find them in the 8th and 9th volumes of *Rymer's Fœdera*; they seem to be almost verbatim the same. There is one of Hen. 8, by the bye, though most of those in Henry 8th's time are very much to the same effect: there is one of the earliest extant after the passing of the statute of Henry 8; which was on the election of the Bishop of Hereford, in 1538, and which directs the archbishop, "Electum cum omni celeritate accommodâ confirmetis;" just as in the statute of Henry 5.

Forms of writs in the reigns of James 1, and Charles 1.

Rymer's Fœdera.

Form in the reign of Henry 8.

The *Solicitor General*. No: there is the want of the word "canonice."

Mr. *Badeley*. The want of that word makes no real difference; for the writ proceeds, "ac cætera omnia et singula faciatis et exequimini, quæ vestro in hac parte incumbunt officio." But afterwards you have the "pastorale officium" introduced into these forms. And in one which occurs soon afterwards, "Omnia et singula quæ vestro in hac parte incumbunt officio pastorali, juxta modum et formam statuti." So that, my lords, as far as the writs go, those writs are all of them rather in affirmance of that which I state, than otherwise; distinctly recognizing, as they do, the pastoral authority, and therefore carrying with them the rights and duties of the archbishop as pastor.

Now, my lords, I would also put this to your lordships. If we find, as I think we may be considered to have found, that, by the ancient canons of the church, (grounded, as they seem to have been, upon the very words of Scripture), as well as by the general rule of the canon law which prevailed during all the period antecedent to the Reformation, and was part of the ecclesiastical law of this realm,

The right of the metropolitan an inherent right, prevailing from the earliest period.

(a) Vide *supra*, p. 59, n.

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the privilege of confirming all suffragan bishops, and therein of ascertaining their fitness, and of rejecting them if unfit, was an inherent right of the archbishops of this realm, and so completely their right, according to the earliest canons of the church, as to be a necessary function, a part of those functions which enter almost into the very idea of a metropolitan; if that is so, if it was so entirely part and parcel of their office, that it could not well be severed from it at all, and this right had always been preserved to them by the general law of the land, except where it was interfered with for a time by the superior patriarchal authority of the Pope, which the statutes themselves have pronounced to be a usurpation; if that is so; if this was the ancient, and, from the earliest period of the church, the inherent right of the metropolitans as such; then I would call your lordships' attention to the remarkable manner in which, from the earliest periods of our history, the rights and privileges of the bishops and of the clergy of this land have been secured to them by successive acts of parliament.

Mr. Justice ERLE. Is not there a part of our history, in which the king claimed to create a bishop, without the aid of the archbishop?

Mr. Badeley. I am not aware, my lord, that he ever did. I never heard of any instance of it; and certainly not of any which was carried into effect. The king certainly could not confer orders: that was never attributed at any period to the crown; and it is distinctly negated by the whole course of our law, and of our history. Indeed, in the Thirty-nine Articles of the church, particular pains have been taken to prevent a misunderstanding about it.

Mr. Justice ERLE. Quite at an early period after the Conquest, was what I was alluding to. I have not examined it myself.

Mr. Badeley. I am not aware, my lord, of any such instance any where. Then, my lords, I was going to say, that if this right of the metropolitan is an inherent right, which has prevailed in England from the earliest period, long before Magna Charta existed here, if that was the ancient rule, wherever metropolitans were established—and we have had metropolitans established in this country from the most remote era,—then I apprehend, my lords, that all those statutes from Magna Charta downwards, which in such express and solemn terms have secured the rights and privileges of all the various orders of the clergy of this country, will furnish to your lordships a plain rule for the construction of any statute relating to any of those orders, in case the language of such statute should be supposed by your lordships to be doubtful. You find, my lords, at the very commencement of the statute book, the confirmation of the liberties of the subjects of this kingdom by the great charter, declaring and confirming that “the Church of England shall be free, and shall have all her whole rights and her liberties inviolable.” You find again, in the time of Edw. 3, that “holy church shall have her liberties in quietness, without interruption or disturbance.” In Edward the Third's time again, “it is ordained and established, that Holy Church have all her liberties and franchises in quietness, without any impeachment or disturbance.” And all the privileges granted to the clergy are repeatedly confirmed.

And comprehended in the rights and privileges of the clergy, secured by various statutes.

Magna Charta:
9 Hen. 3, c. 1.

14 Edw. 3,
st. 1, c. 1.

50 and 51 Edw.
3, c. 1.

There are several enactments in the time of Richard 2 entirely to the same effect, and almost in the very same words. And then in the time of Henry 4, it is expressly enacted, that "all the statutes, ordinances, and grants, made or granted to the clergy of England, for the conservation of their liberties and privileges, and for the conservation of the liberties and immunities of Holy Church, not revoked, be firmly holden, observed, and kept, and put in due execution, according to their form and effect." Similar acts occur again and again in various reigns. And by the statute of the 1st of William and Mary, chapter 6, where we have the coronation oath given, the sovereign is expressly required to swear that he "will preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them or any of them."

Then, my lords, I would say, surely if there are any privileges, any rights, belonging to the church, which must be deemed to be confirmed to them by these statutes, they must be those which are peculiarly characteristic of the respective orders of that church: they must be those which peculiarly belong to the bishops, as bishops; to the archbishop and metropolitans, as such; and to the other clergy, as clergy: those which are inherent in them, which are of the very essence of their office and authority. And if so, the right and privilege for which I contend, and which I have shown to be of the very essence of the authority and inherent functions of the metropolitan, must be deemed to be confirmed, distinctly and directly, by these statutes; or else I should be glad to know what effect is to be given to them at all? What possible meaning can they have, if they are not to be supposed to confirm, and that in the strongest manner, those privileges and those rights which are peculiar to him, the archbishop, and which belonged to him from the earliest period? Then, if that is so, my lords, and if those rights are confirmed and secured so fully, so unequivocally, so repeatedly, and so solemnly, I would ask your lordships, what is the fair construction, what is the right construction, to be put upon any statute which bears upon the power or jurisdiction of any archbishop or bishop, if any word or sentence occurs of doubtful meaning? Is it not at once the duty of every court in this realm, and of every person who is called upon to administer the laws, to interpret every statute, and to carry out each law, in such a manner as to give effect to the rights and privileges which are so confirmed? Surely, my lords, these statutes, if they do nothing else, furnish at least a rule of construction for the statute of Henry 8, while they bind the courts of this land to respect in every possible way the rights and privileges of the bishops and clergy, and of the church of England, to secure them from all invasion, to preserve and transmit them unharmed. I think, therefore, my lords, that these statutes are not to be passed by, but they are really seriously to be regarded in putting any construction upon this statute of Henry 8, or upon any other statute *in pari materia*, upon which any doubt at all can be thrown. It is quite impossible to deny that the same rights and privileges of the metropolitan, which have been always exercised in this country, existed at each period when those solemn provisions and enactments were made. They were then undoubtedly allowed and exercised

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Enactments
temp. Ric. 2.

4 Hen. 4, c. 3.

1 Wm. & Mar.
c. 6.

Uninterrupted
exercise of the
metropolitan's
right, in all
periods of our
history.

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Stat. 25 Hen. 8, c. 20, must be construed in accordance with such laws and usage.

A stat. taking away jurisdiction from a recognized court, to be construed strictly.

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27th Jan., 1848.
Resumé of the previous part of the argument.

without contradiction. As each bishop was elected in each see, the archbishop was called upon to confirm (unless the Pope as supreme metropolitan claimed to do so); and he did confirm the election, and enter into the merits of the elected, as well as into the circumstances of the election itself. And therefore, my lords, it cannot but be supposed that these statutes had reference to these privileges and rights of the metropolitan, as to the other privileges and rights of the clergy; and that, therefore, the true construction of any statute of dubious import is that which most favours and most protects them.

Then, my lords, I apprehend that there is another rule in the construction of statutes generally, which must be regarded as more or less a test, in order to determine the true construction of this of Henry 8. It appears to be a rule, to be deduced from the different books upon the subject, that any statute which takes away jurisdiction from a recognized court, from any court regularly established, is to be construed strictly. And that seems to be the inference from the case of *Stradling v. Morgan*, in *Plowden*, p. 207, and from the other authorities upon the statutes, to which I have already referred your lordships. Here is a court, my lords, the court of audience, or the court of the vicar general,—call it which you please,—or the court of the archbishop, for it is really that. Here is a court exercising an ancient and established jurisdiction, having peculiar and proper functions. If this statute is to take effect according to the construction of my learned friends on the other side, then of course away goes all the authority of that court; away goes at once all its power to act any otherwise than as a mere machine. It therefore seems to follow that, if that rule of construction to which I am now referring is of any value, it supplies an additional and conclusive reason for saying, that the legislature could never have intended to alter in any respect the judicial power of confirmation exercised in this court by the archbishop or his deputy.

My lords, there is another ground, another test, by which this may be tried.

LORD DENMAN. Do you think that you will conclude in a very short time?

Mr. *Badeley*. I am afraid not, my lord.

LORD DENMAN. Then we will go on to-morrow morning.

Mr. *Badeley*. My lords, when I had the honour of addressing your lordships yesterday, I ventured to call your attention to the state of the law, with reference to the business of metropolitan confirmation, prior to the passing of the statute of 25th of Henry 8. And I did so with this view: because, as my Lord *Coke* has laid it down, that in order to determine upon the effect of any particular statute, it is fit and proper to inquire what the law was before the passing of the statute, I thought that by going fully into the history and practice of the canon law in this country, with respect to that particular subject, prior to the period of the Reformation, I was laying the best foundation from which your lordships would be able to collect the effect of the statute in question, and the intention of the legislature in passing it. In order to do that, my lords, I inquired into the state of the canon law, and showed what was the early

history of the metropolitan power; how it arose, how it extended; that it was based upon the canons of the early church, which were themselves deducible from Scripture; that those canons were uniform in the ancient times of Christianity; that from those canons the rule was adopted and incorporated into the general body of the canon law; that so adopted and so incorporated, it became the rule and practice of the ecclesiastical courts and ecclesiastical authorities in England, and that it so remained until the period of the statute of Henry 8. And I thought, and I still think, that by having ascertained that, and shown what was the practice of the archbishops in this country during such a long series of years, I gave the best possible proof of what was the meaning of the word "confirmation," as it occurs in the statute, and what was the intention of the legislature in directing that the archbishop "should confirm;" and that the word "confirmation," being a well known legal term, was to be understood in its legal sense, and therefore as carrying with it all the consequences of that legal sense; and therefore must mean confirmation according to law, with all the same practice and all the same forms of the law which were required at that time, and which, so far as the language of the statute went, were not altered, and seemed not to have been intended to be altered.

Having thus, my lords, laid that ground, I proceeded to the statute itself, and I ventured to submit to your lordships, and to submit with confidence, that the whole purview of the statute is such, as to leave no doubt on the mind of any impartial person who reads it, that the object of the legislature was merely to overthrow the usurped power of the Pope, to destroy that jurisdiction altogether which the Pope had exercised in England; that that was the only design which Henry 8 can be collected to have had from the history of that time; that there is nothing at all in the statute to contradict that inference, but everything to confirm it; that the manner in which the statute was passed, being in connexion with two or three others which were enacted at the same time with the very same object, was a clear and additional proof of what was the intention of the legislature; and, consequently, that in construing the statute, nothing more was required than to effectuate that intention. I then, my lords, urged upon your attention certain rules of construction which must be adopted by the court, with reference to this or to any other statute; and I contended that, inasmuch as by the statutes of this realm from the earliest period, from Magna Charta downwards, and by the coronation oath established by the statute of William 3, and taken by the sovereign at this day, the rights and privileges of the church and the clergy were so strongly and so repeatedly confirmed, and such abundant care taken to uphold the authority of the archbishops and bishops of England, the construction of every statute must be, if its language is at all doubtful, such as will most favour the rights of the clergy, and best support those privileges which have been secured to them and belonged to them from the first; and that if there is anything which the legislature must be understood to have contemplated, with reference to the rights and privileges of the archbishops and bishops, it must be those rights and privileges which are inherent in them, and of the

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argument.

By the rules
for construing
statutes, the
original juris-
diction of the
archbishop's
court must be
preserved.

Rule of con-
struction: a
statute must be
construed
favourably to
ancient popular
rights.

Bac. Abr.

Vin. Abr.

Foster's case.

Bedell v. Con-
stable.

Fludier v.
Lombe.

Share which
the people had
in the election
of their bishops,
in early ages.

very essence of their respective offices; and consequently, that the control which the metropolitan has always exercised over his suffragans as to their consecration, and as to the judgment he is to form of their fitness, is an inherent, absolute power, and of the very essence of his office, and therefore must come directly within the meaning of those statutes which were passed to secure his rights. I argued further, my lords, that there were other rules for the construction of statutes, which were applicable in the same manner. To one I have already referred, which requires that a legal term shall be accepted and taken in its legal sense, and that that legal sense shall be fully carried out. But there was another, which I pressed as important, namely, that where a statute might interfere at all with the jurisdiction of any particular established court, the construction must be strict, and must not be extended (unless the words absolutely compel it) to the destruction of the court or its jurisdiction, but if possible the jurisdiction must be preserved entire; and hence I argued that the jurisdiction and judicial process of the archbishop's court in the confirmation of bishops must be preserved, and that the statute of Henry 8 must, if possible, be so construed so as to give them full effect. The authorities which I cited yesterday fully supported that position. And it is but common sense and common reason; because if a court of competent jurisdiction has existed in this country for centuries, surely it would be doing great violence to the constitution of this country, if a statute, by a secondary or implied sense, by any other than the necessary meaning of its words, could be allowed to alter or interfere with a power so sacred and so venerable.

Those principles of construction, my lords, I apprehend are clearly applicable to the present case. And I now pass on to another, which will be found in harmony with the same authorities; namely, that where any statute may seem to clash with any rights or privileges of the people, with any ancient popular power or influence which has existed from early ages, that power and that influence must not be interfered with; but the statute must receive a strict construction so as to preserve, if possible, the popular rights. My lords, I apprehend the whole history and scope of the constitution of this country is in favour of that position. We find it illustrated by the authorities which are cited in *Bacon's Abridgment*, "*Statutes*," E. 6; in *Viner's Abridgment*, "*Statute*," I. 4; and many others; by *Foster's case*, in 11 *Coke's Reports*, p. 59; by the case of *Bedell v. Constable*, in *Vaughan's Reports*, p. 179; and that of *Fludier v. Lombe*, in *Lord Hardwicke's Cases*, p. 307. And I take it to be a general rule and principle of the constitution, that every intendment is to be made in favour of popular rights. Try this statute of Henry 8, by that principle; and I shall be contented to abide the result. For if there is one thing more clear than another, it is this, that, from the earliest ages, the rights of the people were of the utmost value and importance in the election of their bishops; and that originally, those elections which were not made by the people, or had not at least their concurrence and sanction, were not considered good or valid appointments. My lords, there are various authorities upon that subject; and in fact it is impossible to turn to

any history of the church, and not to see, that the early elections of bishops were either entirely by the people, or subject to their approval. They afterwards became confined to the clergy. From the clergy they passed, for the most part, to the sovereign. From the sovereign, at least in this country, they passed to the chapters. But, my lords, you will find in every stage, in every passage, in every period of this country, the rights of the people were respected in those appointments; and the sanction of the people was considered of the utmost value. My lords, in a book which I hold in my hand, a book of considerable authority both here and upon the continent, a book much esteemed by learned men, the *Vetus et Nova Ecclesiæ Disciplina* of Thomassinus, the whole of that subject is gone into, with very great learning and research; and in stating the early history of the elections of bishops, and the powers which the people had in them, he refers to a letter of St. Cyprian, which shows not only the process in early periods, but also the reason of that process. The passage to which I am referring occurs in the second part of *Thomassinus*, book the first, chapter the second. In the edition which I have here, that of 1787, it is the first chapter in the fifth volume. After having stated the general practice in the early history of Christianity, he says, referring to St. Cyprian's letter: "Eo exemplo ait jussos esse ab ecclesiâ provinciæ episcopos omnes aggregari in eâ civitate cui donandus esset episcopus, utque electio celebraretur præsentē populo, quem cujusquam facinora et virtutes non possunt præterire." And then he quotes St. Cyprian's words, "propter quod diligenter de traditione divinâ et apostolicâ observatione servandum est, et tenendum, quod apud nos quoque, et fere per provincias universas, tenetur, ut ad ordinationes rite celebrandas, ad eam plebem, cui præpositus ordinatur, episcopi ejusdem provinciæ proximi quique convenient, et episcopus deligatur plebe præsentē, quæ singulorum vitam plenissime novit, et uniuscujusque actum de ejus conversatione prospexit:"—words, my lords, which deserve to be handed down and immortalized, showing, as they do, the care which was taken by the early church, that the person who was to be set over any see should be a man of unblemished character; and proving most distinctly the right of the people to object to him, if he was lying under any scandal whatever, in order that either that scandal might be removed by competent judgment, or, if confirmed, the man might be rejected from the appointment. There was nothing then, any more than there is now, there was nothing in that practice to interfere with the rights of the metropolitan: his power to judge of the fitness of the man were unquestioned and unquestionable; the whole was referred to him at the period of confirmation; and upon his judgment, exercised after the most careful examination of the persons objecting, and the charges that were laid, it depended whether that choice was to be considered a right or a wrong one. That was so when the people appointed. The same rule, the same rights of the people to exercise their judgment, to raise their voice against any improper appointment, continued in successive ages of the church; whether the appointment was made by the people or by the clergy; whether it was made by the crown or by the chapters: in each case the rights of the people

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Rights of the people respected through the successive changes in the mode of election.

When the election was in the people.

Thomassinus: *Vetus et Nova Eccles. Discipl.*

And when the election got into other hands.

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argument.

De Marca: De
Concord.
Sacerdot. et
Imper.

Bingham's
Eccles. Antiq.

In this country,
the people al-
ways had the
right of object-
ing, down to
the Reforma-
tion.

Construction
contended for
on the other
side invades
the constitu-
tional rights of
the people.

were respected; and if they had not the power of election, they had at least that of refusing or objecting. And, my lords, in referring your lordships to the authority of *Thomassinus*, it would be endless to select passages from his work; for it teems with instances to the same effect. But I have directed your lordships' attention to this, at the commencement of this volume, as supporting distinctly and conclusively, the position I ventured to lay down. The same may be found in another work which I have before me, that of *De Marca, De Concordiâ Sacerdotii et Imperii*. And there, in the 8th chapter of the 8th book, the subject is treated fully and satisfactorily, and the authority of *St. Cyprian* is cited, and the earlier councils are particularly stated. We are not without authority to the same effect in our own country, for in *Bingham's Ecclesiastical Antiquities*, there is much learning on this subject, and your lordships will find that *Bingham* has given a complete abstract, if I may call it so, of the history of episcopal elections, and the rights which the people had in them. In the 2nd chapter of the 4th book of *Bingham's Ecclesiastical Antiquities*, while he admits that there was a doubt with many authorities as to the extent of the people's rights in the acts of election, (that is, whether the people alone had the power of choosing, or whether they shared this power with the clergy or others,) still he proves abundantly, that the voice of the people was always heard; and, in the whole history of this country, there is nothing to show that the people were ever excluded from all control or influence in this matter. And that they always had the right of objecting to the elections or confirmations of their bishops, is clear from the many instances to which I had the honour of calling your lordships' attention yesterday (*b*). Those instances, drawn from the earlier history of this country, and from contemporary authors, are distinct evidence of what was the law and the practice of this country in this respect, and how the rights of the people were respected prior to and up to the period of the Reformation. Then, my lords, if that is so, surely there comes into immediate operation a most important principle, in the construction of the statute of Henry 8; a principle which the constitution of this country requires to be religiously guarded: because if we are called upon by the learned counsel on the other side to say, that that statute, by a mere inference (for it comes to no more than that), is to be understood to do away with this popular right altogether, which really is the construction they contend for to-day, then I apprehend your lordships must see that the principle I have alluded to is immediately and very grievously invaded, and all the ancient privileges of the people with respect to the appointment of bishops are at once annihilated. The whole thing, as the learned *Solicitor General* called it, becomes in point of fact a mere sham. My learned friend said, and said truly, that by the statute of Henry 8, the election is "thrown entirely into the clouds." And the crown by that statute may say that the person named in the letters missive shall be elected, and that the dean and chapter shall elect none other. If therefore the right of interference as to the election itself is gone, then the rights of the people are

(*b*) *Supra*, p. 345, et seq.

gone also, if they have no power of objecting to the confirmation, as they have hitherto had. And surely, my lords, that is most unreasonable, and would be most unrighteous. You have, from the earliest period of the church, these rights exercised, and preserved to the people religiously; you have them exercised before and after the period of the Reformation. But the construction my learned friends are putting upon this statute, is to do away with them altogether, and to say that no person, no single individual, high or low, from the sovereign to the peasant, except the sovereign, shall have the power of judging at all of the fitness or unfitness of the person appointed. My lords, that does appear to me so monstrous a conclusion, so abhorrent from all the principles of the constitution of this realm,—for we cannot open a single book which treats of the constitution of this realm, which does not observe and comment upon the strict regard to the liberty and the rights of the people, which has always been maintained,—that I cannot bring myself to believe that your lordships will sanction it for a single moment. It is impossible to look at Mr. Justice *Blackstone's* work, and other writers, and not to see that the appointment of sheriffs and all sorts of officers in the earlier periods of our history, was elective, and in the people, to whom the principles of liberty, as Mr. Justice *Blackstone* (I think) puts it, gave a voice in the selection of those who were to be set over them. With respect to the appointment of sheriffs and some other officers we know that the popular power has passed away, but in some, as in that of coroners, it has been preserved; and if in any case it still exists, and can be shown to have been exercised, imperfectly perhaps, but still exercised, then, I apprehend, your lordships, as the guardians of the constitution, in this court, will preserve it, that you will maintain the prerogatives of the people, as well as the prerogatives of the crown, and not allow to be injured, by a side wind or a mere constructive interpretation of a statute, rights which have been so constantly, so cautiously maintained. Rather will you be, as some of the greatest judges have said, “astute” in finding reasons for the preservation of these rights, and careful and anxious to transmit them whole and unimpaired.

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Mr. Badeley's argument.

Those rights to be religiously guarded.

Mr. Justice COLERIDGE. Your argument, as I understand it, is, that the rights of the people were, to interfere in the election?

Mr. *Badeley*. The rights of the people I say were these: that, in the earlier history of the church, those rights were so complete, that they had either the entire power in the election, or a power in common with the clergy; but the election afterwards passed into other hands.

Mr. Justice COLERIDGE. Which rights, you say, did not interfere with the metropolitan's rights at confirmation?

Mr. *Badeley*. Certainly not.

Mr. Justice COLERIDGE. Now you say, the statute has taken away the rights of the people to elect?

Mr. *Badeley*. I admit that the statute requires that the dean and chapter should elect the person nominated by the crown, and none other. I say, if the election and confirmation are to be put upon the same footing, then of course the rights of the people will be con-

Election and confirmation two perfectly distinct things.

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argument.

sidered to be annulled altogether; because then there would be no power in them: if they have no right to object to the confirmation, there will be no power left in them to have their voice heard at all.

Mr. Justice COLERIDGE. The election and confirmation are two distinct parts of the same thing.

Mr. *Badeley*. Two parts, but scarcely to be called two parts of the same thing. And I intend, before I conclude, to refer to that which has been urged on this subject by my learned friends on the other side; for I think their argument was put more than once, that as the statute has rendered the election (as the learned *Solicitor General* calls it) "a sham," therefore the confirmation must be considered a sham also.

Mr. Justice COLERIDGE. I was not going to follow that. You take it, they are two separate things. I wanted to bring your attention to this: your argument is, that we ought to be "astute" in preserving the popular rights, in this matter. If I understand you, the popular right was at the election: that, you say, not by the mere construction, but by the words of the act of parliament, is taken away from the people, and given to the crown. Is not the force of your argument this, that you are desiring us to substitute a new popular right at the confirmation, for the old popular right at the election, which is taken away? That is the difficulty which struck me in your argument.

Mr. *Badeley*. My argument is, not that you should introduce any thing new, but simply preserve what is old. What I say is this: from a very early period in this country, the right of election itself had passed away from the people and become vested, first in the capitular bodies, or in the crown; but the election, by whomsoever made, was always subject to the right of the metropolitan to confirm, and at that confirmation the rights of the people were always respected: the people always were, or always might be, parties to that proceeding; and though they had ceased to elect, they always had a right to make objections.

Mr. Justice PATTESON. Do I understand you to say, that there are authorities to show that that was so, whilst the power was in the crown? Because you say, it passed from the people afterwards to the crown, and that whilst it was in the crown, (and in the crown as a sort of donative), there was confirmation in that case.

Mr. *Badeley*. Certainly, my lord, I do. And I think the instances and the authorities to which I referred yesterday, tend to show that. Because, although the crown had exercised the right of the appointment, it never superseded the rights of the metropolitan. And your lordships will find that in the rights of the metropolitan, there was always the form of confirmation in a solemn and judicial manner; and that, at that confirmation, any person would have the right of objecting.

Mr. Justice ERLE. You are aware of the argument, that during the time the king treated the bishopricks as donative, the claim was, "*per annulum et baculum*" to invest the bishop with spiritual power; and that was much disputed. It was mentioned in the argument on the other side, and that clearly the authorities in the English law

Rights of the
people always
respected at
confirmation.

Right of the
metropolitan
to confirm dis-
tinct from the
right of ap-
pointment, in
whomsoever
vested.

treat of that donation as a confirmation and investing of the bishop with spiritual authority. Sir *William Blackstone* uses the words, that the king claimed the right of confirming and investing (c).

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Mr. *Badeley*. But that did not supersede the authority of the metropolitan,

Mr. *Badeley's* argument.

Mr. Justice ERLE. The statement by Sir *William Blackstone* is, that the Pope complained of that attempt on the part of our kings, as an encroachment on his spiritual authority.

Mr. *Badeley*. It was objected to as an encroachment upon his spiritual authority; and that, my lords, led to the struggle which took place between the crown and the Pope.

Mr. Justice COLERIDGE. There must have been always consecration by a spiritual person.

Mr. *Badeley*. Which never could be performed except by the metropolitan. And according to all the laws of the church, whether a party took from the crown, or from any other person, from the chapter, or the people, in each case the right of the metropolitan was the same; in each case he was to determine upon the fitness or unfitness of the individual.

Mr. Justice COLERIDGE. As now, to a certain extent, before the consecration, the spiritual jurisdiction is in the bishop, as I understand.

Mr. *Badeley*. The spiritual jurisdiction is in the bishop after confirmation, not before it.

Effects of confirmation and consecration.

Mr. Justice COLERIDGE. Before consecration.

Mr. *Badeley*. It is the confirmation which gives the spiritual jurisdiction; but it is consecration which makes him a perfect bishop. Your lordship will find that most distinctly and repeatedly laid down by the authorities on the canon law in this country, and elsewhere. And in the very case in *Palmer's Reports*, which has been so often referred to, *Evans and Ascuthe*, it is expressly stated, that after confirmation, and not before, he is a bishop so far, that he is entitled to exercise spiritual jurisdiction, but that he is not a complete bishop until consecration. The same thing is distinctly shown, as well as the rights of the metropolitan, in that portion of the work of *Thomassinus* to which I have already referred (d).

Evans v. Ascuthe.

Thomassinus.

Mr. Justice ERLE. Allow me to ask you,—as a great deal of your argument is founded upon the assertion of the fact, that the metropolitan, down to the 25 Henry 8, exercised the jurisdiction of confirmation in the same manner as has been seen of late years,—is that consistent with the statement that, from the time of Edward 3 to the time of Henry 8, the confirmation took place by the Pope? Or did the metropolitan concurrently confirm?

Mr. *Badeley*. Confirmation originally took place only by the metropolitan, the Archbishop of Canterbury, in his province. And your lordships will find that, from many of the authorities I referred to yesterday. I think it was about the period of Edward 3, or somewhere about that period, that the Pope became more completely possessed of the right of confirmation; and it was the exercise of

Usurpation of the right of confirmation by the Pope;

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Canterbury.

Mr. Badeley's
argument.

And the re-
vesting of it in
the metro-
politan.

that right by the Pope, which was found to have been so fully established by the practice of this country in the time of Henry 5, that led to the passing of that statute of Henry 5, to which I have called your lordships' attention (e), which recited the misery and inconvenience arising from the schism in the papal see, and vested or re-vested the right in the metropolitan, and required him to exercise it; showing at the same time the great importance attached at that time, both by the kingdom and the legislature, to the act of confirmation, that great inconvenience and misery had arisen from a want of proper confirmation, as involving the whole title and right of the bishops; and it was in consequence of that, that the legislature interfered.

Mr. Justice ERLE. In 23 Henry 8, there is the statute (f) which recites that there were great difficulties in obtaining confirmations at Rome; and therefore, in case of delay on the part of the Bishop of Rome, it enables the archbishops of this country to confirm and to consecrate. That was a conditional power; and that was made absolute by 25 Henry 8, the statute in question, without any application to the Pope.

Capacity in
which the Pope
confirmed.

Mr. *Badeley*. Your lordship will find, in the history of this subject, that after the papacy returned to its proper channel, and there was a recognized Pope, soon afterwards, or at least by degrees, in time he resumed, by his provisions, the authority of appointing, or controlling the appointment of the bishops; but then he did that, where he did it, in a double capacity; or rather he did it in the capacity of supreme metropolitan, and therefore superseding the authority of the local metropolitan, but still in his spiritual capacity. And your lordships will find that there was constantly a practice resorted to at Rome, when the confirmation took place there, as there is at the present day, of inquiring into the character of the individual; but in many instances it will be found that there was a regular process gone through here, by means of bulls sent over to this country.

Mr. Justice COLERIDGE. I was going to ask you: take any period when, by the practice, the Pope's power was at the highest, both as to confirmation and consecration; was that always done by the Pope himself at Rome; or, having the authority, did he depute it to the metropolitan?

Mr. *Badeley*. Sometimes he deputed it to the metropolitan.

Mr. Justice COLERIDGE. He sent bulls to the metropolitan?

Mr. *Badeley*. Authorizing him to do it?

Mr. Justice COLERIDGE. Yes.

Mr. *Badeley*. Yes. But what I say, and I think I show it in many cases, is, he took the whole thing into his own hands, and he did it at Rome by a regular process in the ecclesiastical court, by a regular judicial form of law. Your lordship will find the process at some length in the eighth and ninth chapters of the first book of

Process of
papal confir-
mation.

Barbosa, Jus.
Eccles. Univers.

The pall.
Anselm.

Barbosa's Jus Ecclesiasticum Universum.

Mr. Justice COLERIDGE. You remember the historical fact about Anselm; of William Rufus sending to the Pope, and getting the

(e) *Supra*, p. 350.

(f) *Supra*, p. 31, et seq. n.

pallium of him privately, and keeping the pallium in his own hands, to make terms before he gave it up again. And so it was, I suppose, in many other cases, when it was sent to this country.

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The *Attorney General*. That is after consecration.

Mr. Badeley's
argument.

Mr. Justice COLERIDGE. I am putting both cases.

Mr. *Badeley*. The pallium for the most part was the confirmation given by the Pope to the archbishop.

The *Attorney General*. That was part of the archiepiscopal authority.

Mr. *Badeley*. It was a mark of the archiepiscopal or metropolitan authority; and I believe that his grace, the Archbishop of Canterbury, wears it in the arms of his see at this day.

I have been favoured with some extracts from the ancient register books; and I have here an extract from the register at Exeter of the election and confirmation of Bishop Stapylton, in 1307. He was elected at Exeter, his election was contested, and there was an appeal to Rome; the appeal was given; and then the Pope remitted it to the archbishop, to inquire and confirm in England.

Election and
confirmation of
Bishop Stapyl-
ton, A. D. 1307.

Mr. Justice COLERIDGE. Stapylton was in the time of Edward 2.

Mr. *Badeley*. In 1307.

Mr. Justice ERLE. From the time of King John, till the Pope established his usurped authority, probably the metropolitan would confirm. That would be in the interval between King John and Edward 3.

Mr. *Badeley*. I think, Edward 3. There are instances of confirmation by the archbishop, during the period of the Pope's authority, as well as afterwards.

But, my lords, I would still submit, that inasmuch as the practice, whether at Rome or in England, went on and was observed, and inasmuch as it was a judicial inquiry into the merits and qualifications of the individual, it left the rights of the people untouched; it was open to them to make their objections, wherever the confirmation took place; and those objections were entertained, because the rule of the canon law bound the confirmer to inquire into them, and to encourage the fullest investigation. My lords, I have already mentioned to your lordships the authority of *Barbosa*, as a writer of very considerable eminence as a canonist; and in his treatise "*Jus Ecclesiasticum Universum*," in the ninth chapter of the first book, a great deal, both of legal and historical information, is given upon the subject. He says: "Confirmare autem electos episcopos non solum Romanus Pontifex, verum Metropolitanus vel Patriarcha superior potest." And then: "Papa vero de jure eos tantum episcopos confirmat, qui in ecclesiis sedi apostolicæ immediate subjectis electi sunt, vel quorum confirmatio et infirmatio ad eandem sedem per appellationem devolvitur." Your lordships saw an instance I cited yesterday (*g*). There were two cases in which there were appeals. And in a case to which I have just referred, that of Stapylton, an appeal was carried to Rome; and then the Pope had full power to decide. And there were so many cases of appeal, that they led, in great measure, to the very power that he had in these matters; a

In whatever
quarter the
right of confir-
mation resided,
the rights of
the people were
left untouched.

*Barbosa, Jus.
Eccles. Univers.*

The Pope's
power in
matters of con-
firmation attri-

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Mr. Badeley's
argument.

butable, in
great measure,
to the multi-
tude of appeals.

Thomassinus.

Corp. Jur.
Can.

Decret. I, 23,
63, 64, 65.
Sext. Decretal.
I, 44, 47.

4th council of
Lateran.
26th canon.

Lancelottus.

fact which is stated expressly in the work of *Thomassinus*, to which I have already referred your lordships. *Barbosa* then proceeds to say: "Confirmans autem debet de electi vitâ et moribus, ac qualitatibus requisitis, diligenter inquirere," (quoting various authorities), "quòd si aliqua ei antequam confirmetur crimina objiciantur, purgare se debet, cum requisito numero episcoporum, ut traditum est in concilio Carthagenis quarto." Then he adds: "Hucusque dicta in hoc capite procedunt de jure antiquo, quando electio episcoporum Canonicis Cathedralis Ecclesiæ competeat; hodie verò omnium electio et confirmatio non ab alio quam a Romano Pontifice fieri potest," &c. And then he shows that the same process and examination of evidence and objections took place at Rome. He also cites a particular rule then in force, by which the Pope reserved to himself the right of confirmation generally. In this country he seems to have obtained it gradually; partly by consent, partly by provisions, partly by appeals, and partly by other means; all of which are detailed, and the history well drawn out by *Thomassinus*, in the work which I have already cited.

But my lords, whether the Pope confirmed, or the metropolitan of the province, the whole body of authorities on the canon law are uniform in this, that while it is the business of the confirmer to investigate the character and history and life of the man elected, it is open to any person to show if there is any cause or impediment why he should not be confirmed as a bishop.

There are two or three authorities in the canon law, to which I believe I omitted to refer your lordships yesterday, but which I take the liberty of doing now, as affording, probably, facilities to your lordships in arriving at a true conclusion upon the case before you. In the *Decretum*, there are the distinctiones 23, 63, 64, and 65, at pages 103, 107, 108, 109, 333, 334, 337, and 338, of the first volume of the *Corpus Juris Canonici*; and in the third volume of the *Corpus Juris Canonici*, at pages 188, 189, 195, 196, and 197, the text and the glosses are important to be consulted. I must also beg leave to direct your lordships' attention to the canon of another council, which was held in 1215, the fourth council of Lateran. Your lordships will find it in *Harduin's Collection of the Councils*, vol. 8, p. 39. The twenty-sixth canon runs thus: "Nihil est quod ecclesiæ Dei magis officiat, quam quòd indigni assumantur prælati ad regimen animarum. Volentes igitur huic morbo necessariam adhibere medelam, irrefragabili constitutione sancimus, quatenus cum quisquam fuerit ad regimen animarum assumptus, is ad quem pertinet ipsius confirmatio," (that is, whether he be the provincial metropolitan, or the Pope),—"is ad quem pertinet ipsius confirmatio diligenter examinet et electionis processum, et personam electi, ut, cum omnia rite concurrerint, munus ei confirmationis impendat; quia si secus fuerit incaute præsumptum, non solùm dejectus est indignè promotus, verùm etiam indignè promovens puniendus."

These words are remarkable, because they are precisely the same which *Lancelottus* has incorporated into his book, and which were made the subject of observation the other day (*h*). I think my

learned friend the *Attorney General* suggested that inasmuch as the "promovens" was the crown, and the crown could not be punished, therefore the whole was of no avail, and we were not to look any further, and that that seemed to neutralize the rule altogether. But that is not so; for, in the first place, my learned friend has mistaken the meaning of the passage: the "promovens" here is the party confirming, not the party electing, or nominating, as is evident from the context. And in the second place, even if the learned *Attorney General's* interpretation were right, his conclusion would be wrong; for without entering into the question of the liability of the sovereign to ecclesiastical censures, the "indigné promovens" might at all events be punished if he were a subject. And in this country we have had, till very late years, an instance where, even according to my learned friend's interpretation of the word "promovens," the party "indigné promovens" might have been punished; for, not many years ago, there was in this country, or rather, in the Isle of Mann, a bishop who was not appointed by the crown, but by a private individual, the right of nomination having been formerly vested in the Earl of Derby, and afterwards in the Duke of Atholl; and those individuals might have been liable to canonical censure (supposing my learned friend were right) if an improper person had been appointed. And we know that in that case the person so appointed was confirmed (i); that he was presented to the Archbishop of York, and confirmed by him; for in *Strype's Life of Archbishop Grindal*, p. 260, particular mention is made of the confirmation of a bishop of Sodor and Mann. I throw this out for the mere purpose of giving a complete answer to my learned friend's objection, which would not hold under any circumstances; and it certainly would not follow, that because a part of the rule could not take effect, the whole was therefore of no avail. But (as I said before) the objection is founded on a misinterpretation of the passage; for the canon in question proceeds thus: "Ipsum quoque decernimus hâc animadversione puniri, ut cum de ipsius constiterit negligentia, maxime si hominem insufficientis scientiæ, vel inhonestæ vitæ, aut ætatis illegitimæ, approvaverit, non solum confirmandi primum successorem illius careat potestate, verum etiam, ne aliquo casu pœnam effugiat, a perceptione proprii beneficii suspendatur, quousque, si æquum fuerit, indulgentiam valeat promereri. Si vero convictus fuerit in hoc per malitiam excessisse, graviori subiaceat ultioni." Thus the metropolitan, the party confirming, if he acted through carelessness, was exposed to the censures specified; if he acted through any improper motive, then he was subjected to greater punishment.

But I return to my former argument. And if the facts are such as I have stated, and the public have always been entitled to object to a bishop elect, as unfit or unqualified, I would again most humbly, but most earnestly, urge upon your lordships' consideration the necessity of a supreme court, like this, giving effect to the rights of the people, and enabling those who are to become subject to the jurisdiction of any bishop, to show such cause as may exist, why he should not be admitted to exercise that jurisdiction.

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Meaning of "indigné promovens."

Bishoprick of Mann formerly in the gift of private individuals liable to canonical censures.

Confirmation of Bishop of Sodor and Mann.

Strype's Life of Archbp. Grindal.

Punishment for improperly confirming an unworthy person.

Effect to be given to the right of the people to object.

(i) Vide *supra*, p. 200, n.

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Right con-
tended for
necessary to
prevent abuse.

My lords, there are many matters which can only be known to those who are either living in the world, and mixing much in society, or living in the particular diocese or district from whence the individual who is to be appointed comes, and which the archbishop, if he merely sat and acted ministerially, would not be able to ascertain at all. And if those who know of any real impediment against the bishop elect, are debarred from the means of coming forward, and stating what it is, and laying it before the archbishop for investigation, the probability is, that a vast number of abuses will creep into the church; and the archbishop may, in spite of whatever wish he may have to the contrary, be entirely shut out from information, though such information be not only most essential to the interests of the church, but even necessary for the safety of his own conscience. For assuredly a more awful responsibility cannot be incurred by man, than is incurred by the metropolitan, in the consecration of a bishop. For what is the position which a bishop fills? He is placed in the highest office of the church, and invested with spiritual and ecclesiastical jurisdiction over a vast number of the clergy and of the laity also. He is invested with powers which are very large, and which involve the most serious consequences, which are in point of fact, in some respects, arbitrary, as they are in the reception of persons into holy orders. He has a large discretionary authority. And unless the people are not only allowed, but invited to come forward and object, how are they to know that any regard is paid to their interests; how are they to be assured that proper caution is observed, or that any complaints which they are entitled to make will meet the ear of the proper authority? Look, my lords, at the mischief which must arise if the voice of the people in such a matter is stopped. A man may have lived in the greatest iniquity, and he may be the greatest scandal to the neighbourhood in which he may have lived; but so far as the crown or the archbishop is concerned, there may be no means of obtaining any information with respect to that. Take again the case of the party's age. A person who has lived with the man, or with his family, all his life, may know that he is not of the canonical age; and, being older, he may possibly know that of his own knowledge, better than even the bishop elect himself: ought he not therefore to be allowed to prove it? Still more, in the case of a disreputable life; or supposing the man has used expressions, or done that, which shows his belief in the fundamental doctrines of Christianity to be unsound, or questionable, unless there is a power of bringing those things forward fully, and requiring them to be examined into, and pressing such inquiry upon the archbishop, what injustice and mischief may be done! Here is a vast number of persons, both clergy and laity,—for the laity are amenable to the spiritual jurisdiction of their bishop,—committed to the jurisdiction of this man: over many of them (as I have stated) he has to exercise almost an arbitrary authority: he has to determine questions of doctrine and of practice, to act judicially, to guard the faith and the morals of his diocese. Is it not, therefore, fair and reasonable that those who are to be subjected to such authority should have an opportunity of showing the scandal, if scandal there be; that they should have an opportunity of saying,

"We know that this man holds such and such opinions; we know he is an unsound teacher; we know he is a man of immoral and disreputable character; we claim to have that investigated; where we have not seen it ourselves, we have the best reason to believe it; and we desire that the matter should be sifted?" Is that not fair and reasonable, even as between man and man, and in matters of merely worldly interest? But, my lords, if it be reasonable as between man and man, and in secular concerns, is it not very much more important, that, in matters of sacred duty, of spiritual concern, of the most solemn interest which can attach to man below, is it not in these of the utmost value and importance that that power of investigation should exist? To say that a person may communicate in private to the archbishop is quite another matter. It is quite another thing to say that a person may write to the archbishop, a person of whom probably he knows nothing, and whose letter perhaps may never reach him. And is it not consistent not only with fair inquiry, but with the first principles of the English constitution, as well as of the English church, that there should be an opportunity of bringing these things before the public, and in open day of canvassing the history of the man, and making those investigations which ought to be made; of showing their fallacy, if they are fallacious, or proving their correctness, if they happen unfortunately to be true?

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My lords, I should hardly have thought this matter deserved a lengthened argument, or was necessary to be dwelt upon. But inasmuch as we have here the learned representatives of the crown, coming forward, and claiming for the crown a prerogative and a privilege which is to annihilate all this process, all these rights, all the ancient exercise of that influence which the people have always had, all that salutary check upon improper appointments which has hitherto existed, I do feel that it is necessary to put this strongly before your lordships. And I most earnestly beg that your lordships will pause before you give such effect to a statute, passed at such a period as that of Henry 8, passed under such a monarch, and under such influences as we know prevailed,—before you sanction the doctrine laid down by the representatives of the crown, and thereby subvert the privileges of the people, and establish in their stead an Erastian tyranny, which must be the means of doing the most irreparable injury to the church and to the best interests of society.

My lords, we have heard a great deal of the penalties of *præmunire*, and of the terrors which this statute enforces against all persons who do any thing to hinder the execution of the act. I ventured to submit yesterday (*j*), that the penalties of *præmunire* may be considered as extinct, by means of that part of the statute of Elizabeth, which directly applies to the case of *præmunire*, and which I then read to your lordships. I mentioned also that I thought there was ground for saying, that the opinion of my Lord Bacon probably was, that the archbishop, at least under the statute of Henry 8, would not be liable to the penalties of *præmunire*. I have now brought the volume of Bacon's works, which contains the

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Bacon.

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An indictment
not sustainable
against the
archbishop,
unless his dis-
obedience be in
aid of the papal
authority.

treatise to which I referred; and there, my lords, I think that his view will appear to be consistent with my statement. He may possibly not have considered the penalties of *præmunire* inflicted by the statute of Henry 8 to be affected by that clause of the statute of the 1st of Elizabeth, though we may think they are; and if my construction of the statute of Elizabeth holds, there is an end of them under this act. But supposing they are not so got rid of, supposing they still exist with respect to deans and chapters, it does not follow that they exist with respect to an archbishop, or that they ever did exist against him, unless his disobedience to the act was in aid of the Papal authority. Lord *Bacon* specifies various cases of *præmunire*; and amongst these he says, "Where the dean and chapter of any church, upon the *Congé d'élire* of an archbishop or bishop, doth refuse to elect any such archbishop or bishop as is nominated unto them in the king's letters missive, it is a case of *præmunire*." But he says not one word about the archbishop: he does not refer in any manner to the metropolitan. But he *does* refer to "purchasing or accepting any provision," or other thing, from the see of Rome. He particularly mentions the purchasing or suing for bulls, instruments, or other things from the court of Rome; or allowing any thing which was calculated to introduce the authority of the Pope, "or touch the king in his regality." And therefore, my lords, it would seem, that my Lord *Bacon*, who most undoubtedly had the statute of 25 Henry 8 under his consideration with reference to deans and chapters, and therefore probably with reference to archbishops also, understood its meaning to be, that the penalty of *præmunire* would only attach to the archbishop in case he refused, as the statute says, in consequence of any bull or provision from Rome. And I think, my lords, if we look a little more closely to that clause of the statute which imposes the penalties of *præmunire*, your lordships will see that really no indictment could be safely framed upon it against the archbishop, without charging him with some act or refusal in obedience to the see of Rome. For the words are, "Or else if any archbishop or bishop within any the king's dominions, after any such election, nomination, or presentation shall be signified unto them by the king's letters patents, shall refuse, and do not confirm, invest, and consecrate, with all due circumstances as is aforesaid (*h*)."^(k) So the refusal would be, not doing that according to the king's letters patent. But what are the directions with respect to the king's letters patent? That the king's letters patent shall mark out the person who is to be nominated to the bishoprick, and that they shall "require and command the said archbishop to confirm the said election, and to invest and consecrate the said person so elected, &c., and to give and use to him all such benedictions, ceremonies, and other things requisite for the same, *without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome for the same in any behalf* (*l*)."^(l) Therefore, as I suggested before, the letters patent would not be complete, unless they commanded the archbishop to perform his office without suing and procuring bulls from Rome: they would not comply with

(*h*) 25 Hen. 8, c. 20, s. 7.

(*l*) Sect. 5.

the statute, if they omitted this clause. And therefore, if an archbishop were to be charged by indictment on this statute, he would be charged for disobedience to the letters patent; and the letters patent would be shown; and he would only then be guilty of disobedience to the mandate, if he refused and did not confirm and consecrate by reason of having received certain bulls from Rome. For if the letters patent omitted this, they would not sustain the indictment: and if the indictment did not aver the disobedience, as the statute describes the offence, it would be entirely bad. If this is so, it explains the passage in Lord *Bacon's* treatise, and reconciles it with the statute. Lord *Bacon's* construction of the statute is then the same as that for which I contend. Take his words in any other way, and my Lord *Bacon*, with the statute before him, has misconstrued it in a very remarkable way; which, considering what he was, is at least improbable. Then again, the 7th clause goes on: "Or else, if any of them, or any other person or persons, admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of due execution of this act;" then they shall incur the penalties, &c. Supposing therefore, my lords, that any other person than the archbishop were indicted under that statute, so as to be made liable to the penalties of *præmunire*, the indictment would charge him with acting "to the contrary or let of the due execution of this act." But what is the due execution of this act? Why, every section of it shows that it is the repudiating or disallowing of any bulls or process from the court of Rome; and that mere delay, the merely not acting, upon grounds altogether unconnected with Rome, would not be within the provisions of the act. And Lord *Bacon's* silence upon this subject, in his enumeration of the cases of *præmunire*, is a remarkable confirmation of my assertion. And therefore I contend with confidence, that it would be impossible to indict either an archbishop, or any other person who was acting with him in a supposed violation of the statute, if the penalties of *præmunire* were to be enforced, unless the indictment charged the intervention, delay, or whatever it was, as an offence connected with the see or court of Rome. The clause of the statute which imposes a *præmunire*, being so highly penal, must of course be strictly construed: nothing is to be brought within it, which is not expressly or necessarily required: and it seems to consist of two portions; one relating to a wilful refusal, an active refusal, on the part of the archbishop, because it is, "if he shall refuse, and do not confirm, invest, and consecrate;" the other to a passive resistance, where he merely permits or suffers any intervention of the court of Rome. But both portions of the clause have reference to the same object, the extinction or prevention of the papal jurisdiction. What then becomes, my lords, of all the terrors of *præmunire* upon this occasion? What force can they possibly have, where a person is fairly taking exceptions to the fitness of a bishop elect, and where the archbishop is only obeying what is the regular authorized direction of the law? No man can be guilty of a crime in using or resorting to the process of a legal tribunal; and if that is a maxim anywhere, it must be so

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pealed by
effect of 1 Eliz.
c. 1, s. 32.

Confirmation
now and always
a judicial pro-
ceeding.

here, where the crime in question is so highly penal. And I am astonished that it should have been for one moment supposed, and still more that the vicar general should ever have thought, that any person coming into the archbishop's court in a regular, formal, and judicial manner, cited publicly, and called upon to state objections, or that the persons entertaining those objections, could become subject to the penalties of this (I must be allowed to call it) tyrannical act. But the statute itself does not justify such a supposition; and the well known principle of law which prevents a legal objection, or the effect of a legal process, from being converted to the prejudice of an individual, of any person who sets it in motion, would be surely sufficient to protect any person against the penalties of *præmunire*.

But, my lords, as I have already said, if the clause in the statute of the 1st of Elizabeth, chapter 1, which relates to the penalties of *præmunire*, be applicable here, then those penalties are got rid of, not only with respect to the archbishop, but with respect to the dean and chapter and all other persons.

Mr. Justice PATTESON. That is the 32nd section: is it not, Mr. *Badeley*?

Mr. *Badeley*. Yes, it is, my lord.

Mr. Justice PATTESON. It describes the act as an act of repeal; but the 29th section enacts a *præmunire* in a new case, and it seems to set up the *præmunire*.

Mr. *Badeley*. In that case it is preserved. But your lordship will remember that the statute of Henry 8 does not now date from Henry the Eighth's time: it dates from the period of Elizabeth. It expired, and was revived, and takes effect now from the statute of Elizabeth, which brought it into operation then, and re-enacted it in very express terms. But there is this proviso, that nothing shall apply to *præmunire*, so as to revive those penalties, by the repeal of the statute of Philip and Mary; and if so, those penalties in Henry the Eighth's statute are still repealed.

Then, my lords, let us next consider what this business of confirmation is. We have seen it prior to the statute of Henry 8, and up to the period of the Reformation. And we see still, by the process continued down to the present day, that it has always been a judicial proceeding, an inquiry in a court regularly held; citation of parties, examination of witnesses, and a definitive sentence. Nothing can more clearly indicate a court than that. And the sentence of the court is in terms declared to be judicial. And hence, I repeat, it follows, that if the statute of Henry 8 says, the archbishop "shall confirm," it must mean confirm according to ecclesiastical rights and forms, and in a judicial proceeding: it certainly cannot be considered to convert a judicial act into a ministerial one. The mere enactment that a person, a judicial officer, a very high judicial officer, shall do a judicial act, cannot convert the act into a ministerial one: it cannot make it less judicial. He is required to do what? To do a judicial act; to do an act, which of itself implies, from the very legal meaning of it, the exercise of a judicial discussion and inquiry. And therefore, if the statute used those words and no other, I should like to know how any construction of it is to convert the act required into a totally different process. If that was the

object of it, how came the word "confirm" to be left there at all? Why should it have been preserved in the statute book?

Then, my lords, I would further say, in answer to some of the observations on the other side, that the business of confirmation is not so much a part of the election of a bishop, as a part of consecration: it was always an appendage, as it were, to the process of consecration. Your lordships will find this very clearly shown by the different authorities on the subject, and, amongst others, by the glosses of *John De Athona* on that very constitution of *Othobon* "*De Confirmatione Episcoporum*," to which I had the honour of referring your lordships yesterday (*m*). The confirmation is put as part and parcel of the office of consecration; and therefore it is not true to say, that, either in England, or elsewhere, it ever was a part of the election. And if it be not, then any enactments which relate to the election, and alter the practice with respect to that, cannot affect the confirmation at all. But not only do the canon law authorities, but the ancient liturgies also, show that confirmation is distinct entirely from the business of election; that it is a preliminary branch of the consecration. And this, I think, is a complete answer to my learned friends' objection that confirmations must share the fate which the statute has fixed on elections. Granted that the statute has, in substance, annulled the ancient right of election, or transferred it to others, it cannot, by any intendment of law, any fair construction of words, be applied to that which is altogether distinct, to part of another thing, and which other thing is required, by the express words of the statute, to be performed with all the usual customs, ceremonies, and rites. If therefore the matter of confirmation is one connected rather with consecration than with election, that which requires confirmation as well as consecration, without any more particular explanation, must be held to mean that confirmation should be understood in its original acceptation; that it should continue, what it had always been, a judicial process, and no other.

One of my learned friends, I think, said, that it would be almost absurd to suppose that Henry 8, when he was passing that statute, would not do his work thoroughly, and make it complete, so as to give him the entire and absolute power in these matters (*n*); and therefore your lordships were to infer, that when he required confirmation to be performed, he required it to be performed just in the same manner, and as absolutely, as he required the election to be made. Now if I am right,—and I say with confidence I am, because the works of authority will bear me out in this view of confirmation,—

Mr. Justice ERLE. What is it that is confirmed?

Mr. *Badeley*. The election. But the confirmation of the election is not and cannot properly be regarded as part of the election; it is much more properly connected with consecration; it is a function of a different party, involving a separate and different inquiry, who thereupon sanctions and gives effect to that which has already been done by another.

Mr. Justice ERLE. If it be judicial, the judgment may be two

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Confirmation a part, rather of consecration, than of election.

John de Athon.

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Confirmation therefore survives the virtual extinction of election.

(*m*) *Supra*, p. 345.

(*n*) *Supra*, p. 208.

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argument.

The arch-
bishop's sole
power of con-
firming the
bishop elect, is
in no case taken
away by the
stat.

And if the
archbishop re-
fuses to con-
firm, the bishop
elect must
remain un-
consecrated.

Bishop Gibson.

ways, either to confirm or to annul. Supposing it to be annulled, what is to be annulled?

Mr. *Badeley*. The election, or the appointment. That was the ancient law certainly, and there is nothing in the statute to alter it. But, my lords, I was about to say this: if the intention of Henry 8 was, as my learned friend Mr. *Hill* put it, to carry out the matter thoroughly, and to force upon the archbishop, *volente volente*, the person so nominated, I simply answer, he has not done this; for if your lordships look at the statute, you will find that, supposing the archbishop does not confirm the election, if he omits to confirm it, or refuses to confirm it, there is no other person who can; there is no authority for any other person whatever to confirm and consecrate the individual so rejected. Your lordships will find that the nomination of any person, or the election of any person, is required by the statute to be signified to the archbishop of the province: there is no provision made for signifying it to any other person. If the archbishop chooses to hold out, supposing that he chooses to say, that he will not, or cannot consecrate that individual, there is no power on earth which can compel him; there is no power on earth to send that person to any other archbishop or bishop; and the man must remain unconsecrated. The archbishop has the sole power under the statute, and under the ecclesiastical law. Henry 8, with all his tyranny, has never gone so far as to alter that; and therefore the argument of my learned friend as to any such supposed intention falls to the ground at once. I may observe that Bishop *Gibson*, in the first volume of his *Codex*, particularly notices this point; for he says, at page 114, "And it is observable, that though the act (besides the penalty of not electing) hath provided a plain and immediate remedy for the advancement of the person recommended, in case the dean and chapter refuse to elect, namely, that he shall be presented by the king's letters patents; yet, in case of election made, and a refusal to confirm, there seems to be only a penalty on the person or persons refusing, without other remedy." And then he goes on and refers to legal authorities. Your lordships must see, on looking at the statute, that there is no provision made for supplying the place of the proper metropolitan, and therefore that the will of the archbishop is final. There may be violence done him, and tyranny exercised over him. Supposing he were liable to *præmunire*, he might be prosecuted under that statute. But his act, or his refusal to act, remains good: nothing touches it: the individual cannot be consecrated. So that disposes, I think, of that objection altogether.

Then my learned friend, the *Solicitor General*, talked of confirmation as a mere "sham." Certainly that struck me as rather extraordinary language for a *Solicitor General*. It seemed strange that where a statute expressly requires a particular form and process to be gone through, that process having a known and legal acceptance, it should be called a mere sham by a law officer of the crown.

Mr. Justice COLERIDGE. Before you go to that, allow me to ask you, are the temporalities, in fact, restored to the bishop before consecration, or afterwards?

Mr. *Badeley*. Not till afterwards: there must be a writ, or some process issued out; and in practice they are never restored until after consecration.

Mr. Justice COLERIDGE. Would a mandamus lie to the archbishop to consecrate him?

Mr. *Badeley*. I think not. I never heard of any such case. I apprehend that, by the ecclesiastical law, the discretion of the archbishop is left open. The statute has imposed certain penalties, but has not gone further. And those penalties, I contend, are only incurred, if at all, by a refusal to confirm and consecrate, connected with the Papal jurisdiction. If the statute meant to do violence to the conscience of the archbishop, so far as to compel the consecration of a person who had been refused by the archbishop, how is it that it did not go on and provide for the issuing of a commission to certain other bishops to consecrate the individual so named? But this it has not done; and therefore the statute has not carried out fully the tyrannical intention of the king.

Mr. *Waddington*. As to the time the bishop receives the temporalities, it is arranged, by the 6th section of the act of 25 Henry 8, that, after the archbishop has been consecrated, he shall sue out his temporalities. "Every person and persons being hereafter chosen, elected, nominated, presented, invested, and consecrated to the dignity or office of any archbishop or bishop, according to the form of the act,.....shall have and take their only restitution out of the king's hands."

Mr. Justice COLERIDGE. I asked the question to see whether there was a temporal right dependent upon consecration.

Mr. *Waddington*. The statute provides for every thing.

Mr. Justice COLERIDGE. You say it provides for every thing. Do you mean to suggest, in answer to the last observation, that the statute does provide in case the archbishop shall refuse to consecrate?

Mr. *Waddington*. It provides a penalty, which I suppose is considered amply sufficient.

Mr. *Badeley*. Not sufficient in the case of the dean and chapter. There is a provision made that the king shall elect absolutely, so as to supersede the dean and chapter.

Mr. *Waddington*. The effect of *præmunire* would be, that the archbishop would be deprived of his archbishoprick.

Mr. *Badeley*. That is an assumption. The statute says no such thing. And if the construction I mention is correct, the penalties come to nothing. For as the statute of Henry 8 is revived by the statute of Elizabeth, I think the 32nd clause of the statute of Elizabeth is a bar to the penalty of *præmunire*.

Well then, if this proceeding be a "sham," I must beg leave to ask when it became so? It certainly did not become so during the long period in which those precedents occurred, which I cited to your lordships yesterday. It certainly did not become so at the time of Henry 8 himself; because not only was the process gone through, in all its forms, upon Cranmer's election, but we have in the Registry of Canterbury various confirmations by Cranmer himself, which appear to be, if anything can be, solemn judicial investigations.

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No mandamus to compel consecration.

The bishop receives the temporalities after consecration.

Confirmation improperly characterized as a "sham."

Instances of the mode of confirmation from the Registry of Canterbury in the

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time of
Cranmer.

Religious so-
lemnity of the
act, as per-
formed by
Cranmer.

Register of
Archbp. Chi-
cheley.

Confirmation of
Archbp.
Parker.

Cross-exami-
nation of wit-
nesses at confir-
mation.

I have procured a search to be made upon this subject in the Registry of Canterbury, and certainly none of the cases that have been found have any appearance of "a sham." There are notices of the confirmation of Goodrich, who was made Bishop of Ely in 1534; of Shaxton, who was made Bishop of Salisbury in 1535; and of others in the time of Cranmer. And it is observable, that in these, as in others of previous periods in the Archbishops' Registers, there is distinct evidence of examinations carefully made, of witnesses having been called, and cross-examined, as to their means of knowing the individual, how they came to know him, how long they had known him, and what his habits were; and the investigation appears to have been gone into much more fully than it would be now, in any court of *Nisi Prius*, in an undefended action; opposition being actually invited. And then you have the confirmation made; and so far from its being "a sham," (unless Cranmer was really the greatest hypocrite that ever lived), you have him using those solemn words in the act of confirmation: "Christi nomine primitus invocato, ac ipsum solum Deum oculis nostris præponentes." Can any words be more solemn than these? Can any more clearly show that the act of confirming was done with all the solemnity that could be attached to it? And these words are the more remarkable, because they were first introduced on these occasions by Cranmer himself, and therefore they prove that so far from regarding these things as "shams," he deemed them some of the most serious in his archiepiscopal career.

In the more ancient Register of Archbishop Chicheley, we find the same forms, and the same investigation; witnesses examined and cross-examined in the same manner, and the very language almost verbatim the same. The act of confirmation, indeed, has not those solemn words which I have just read, and which (as I have said) seem to have been introduced by Cranmer; but in other respects it is the same, and those very words introduced by Cranmer have been since preserved. I believe they occur in the form of confirmation which was referred to by Dr. Addams yesterday (o), as having been used in the case of Archbishop Parker; and it is remarkable also, that there the process was continued from day to day.

Mr. Justice COLERIDGE. You said just now that witnesses were not only examined, but cross-examined: do they appear to have been cross-examined by the archbishop's officers?

Mr. Badeley. Yes.

Mr. Justice COLERIDGE. Or some parties interested?

Mr. Badeley. Yes: Cross-examined.

Mr. Justice COLERIDGE. That is sifting; not technically cross-examining.

Mr. Badeley. Sifted.

Mr. Justice COLERIDGE. Is there any instance of an opponent of a bishop elect coming in, and claiming the right you are now claiming?

Mr. Badeley. I think there is, my lord.

Mr. Justice COLERIDGE. I do not mean a "co-electus," or man

who disputed a popular election; but a person who objected to the fitness of the bishop.

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Mr. *Badeley*. I am not able to say. I have not had time to look very carefully through them. At all events, witnesses were examined, not merely taking them upon trust from the representations of the proctor of the bishop; but witnesses were called and examined. And not only that, but opposers were cited. That appears distinctly.

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argument.

Mr. Justice COLERIDGE. You mentioned just now, that the same form was used at the confirmation of Archbishop Chicheley.

Mr. *Badeley*. Yes.

Mr. Justice COLERIDGE. That is much earlier.

Mr. *Badeley*. I mentioned it as an additional proof of the constant uniformity in these proceedings, both before the period of the Reformation, and at and after that period. I showed this yesterday, in several instances; and we have the fact more fully in the confirmation of Archbishop Chicheley; we have the same forms gone through in perhaps nearly the same order; and then we find words of still greater solemnity introduced in Cranmer's time, which seem quite at variance with the notion of a "sham." Then, my lords, it did not become such under Cranmer. It does not appear to have been so in Archbishop Parker's time; because in Archbishop Parker's time we see the whole process most fully and most completely in that book to which my learned friend Dr. *Addams* referred, the third volume of Archbishop Bramhall's works, p. 173, &c.; and there I should remark that it is not only quite as solemn as any, but the proceeding seems to have been much longer than usual, and to have continued for several days. Well then, my lords, I say it was not a sham in Parker's time. Neither was it such in Whitgift's time; because in the *Life of Archbishop Whitgift*, by *Strype*, there is the account of his confirmation; there is the citation *contra oppositores*; and it is expressly said that the bishops who were commissioned for the purpose took upon them the burden of the confirmation, "*sitting judicially et pro tribunali*;" that is the language used; and then, there is the definitive sentence: "Then the said Reverend Father, John, Bishop of London, with the assent and consent of the aforesaid Reverend Fathers, Edmund Peterborough, Thomas Lincoln, and John Sarum, respectively, the said bishop's colleagues, read the definitive sentence, or final decree in this cause, to be pronounced and decreed; and did other things as were contained and mentioned in the said sentence; and to the same they subscribed their hands." So that, there, the whole process seems to have been kept up, and all the forms duly observed. Then if it was not a mere form and a sham in Parker's time, or in Whitgift's time, (and there is less reason for supposing it so in Cranmer's time), I ask again, when did it become so? As far as we have evidence of the process used at later periods, there is nothing to show that it was less real or serious than before. It seems, from the case of *Evans v. Ascuthe*, which was cited yesterday, that it was not a sham at that time; because the whole process is almost set out at length, and the judges refer to it as something real. And I do not think that because no one came forward to oppose, therefore it is to be

Constant uni-
formity in the
proceedings
both before and
since the Re-
formation.

Archbp. Whit-
gift's confirma-
tion, from
Strype.

Forms ob-
served since
not less solemn.

*Evans v. As-
cuthe*.

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Testimony of
Bishop Fell, as
to the practice
in his day.

inferred that none might, when every invitation was given to them; because we never heard till the other day of such an inference, and none of the books or precedents justify it. Then, so far as *Evans v. Ascuith* goes, the thing was not a sham at that time. Let us go on a little further chronologically, and I think we shall find an instance at a later period, in the time of Charles 2. We have it upon the authority of no less a person than Bishop Fell, who was, as your lordships well know, a very learned man; and in his edition of the *Epistle of St. Clement*, there is a curious and interesting note upon the subject of the election and confirmation of bishops. He sets out the form, not indeed *in totidem verbis*, but still so fully, that it is worthy of your lordships' attention. He is speaking of what prevailed in England, in his time, and endeavouring to prove that the appointment of bishops in the English church was consistent with the primitive method; and he does this in order to defend the church of England, and to answer objections made to it. Now Bishop Fell knew, nobody better, what was the practice in the primitive church; and having shown what it was, he proceeds to consider the practice of the English church. His words are these: "Nec aliud fere agitur, in constituendis apud nos episcopis; licet enim nominatio (quæ quidem plurimum valere solet) penes sit principem, electio tamen ad presbyterium sive episcopalis sedis capitulum (veteris Alexandrini moris ad instar) etiamnum pertinet. Eâ tamen peracta (quod etiam Alexandriæ factum intelligere est, vel ex loco Theodoretî modo laudati), plebis assensus demum expectatur; in quem finem, electio a presbyterio seorsim habita ab iisdem plebi universæ, in navi ecclesiæ cathedralis, solemniter solet renunciari, qui plerumque eandem gratam atque ratam habent. In illo insuper instrumento, quo de istius modi electionis tenore et summâ certior fit Regia Majestas, cleri item et populi, quibus communicabatur per electores electio recens facta, approbatio et applausus nunquam non memoratur." He then proceeds to describe particularly the process of confirmation:—"Accedente postmodum electionis istiusmodi assensu quem vocant regio, emanat ex parte serenissimi Domini nostri Regis mandatum ad metropolitam datum, ut ad electionis nuper factæ confirmationem quamprimum procedat, quod sine juris solemnibus apud nos nunquam fieri consuevit; hinc metropolita, cui confirmandi solemnia jure competunt, citationibus quam fieri potest maxime peremptoriis, omnes et singulos, qui sua putaverint interesse, compellat, ut die, horâ, et loco convenientibus et præstitutis, se sistant coram eo, aut Vicario ejus Generali, causam si quam habuerint, sive contra electionis formam, sive contra personam electam dicturi, et in forma juris allegaturi: ubi vero tempus in citationibus assignatum advenierit, procurator eligentium se sistit pro tribunali, et confirmationem episcopi electi instantè postulans, petitionem summariam exhibet, in quâ ponit et asserit episcopum electum, quoad probitatem morum, quoad scientiam, tanto muneri congruam, quoad ordines, natales, ætatem, et alia id genus, esse habilem, idoneum, et ecclesiæ viduatæ, quæ eum postulat, apprime utilem, imo necessarium. Quæ quidem petitio summaria, ut et ea quæ in subsidium probationis per istiusmodi procuratorem adducuntur, haud prius admittit metropolita sive Vicarius ejus Generalis pro tribunali sedens, quam oppositores

(si qui sint) in istum locum, diem, et horam citatos, præconizari iusserit; et nemine comparente,"—(I will call your lordships' attention to this—) "et nemine comparente, (quod tamen non semper evenit) pronunciaverit contumaces. Oppositoribus tamen non præcluditur objiciendi contra personam electam, sive formam ipsam electionis, aditus, per sententiam definitivam electi confirmatoriam; nisi præconizatis iterato illis, quibus, virtute citationis primariæ, per loca solita affixæ, semet opponere confirmationi jam expediendæ, vel in ipso momento sententiæ prolationem præcedente, integrum est. Ita ut populi, etiam quantumvis laici, non solum approbationem requiri, sed etiam oppositionem (si qua subest causa) attendi, imo et judicialiter sollicitari, ex lege constat." Words cannot be stronger than those to show what was the practice at that time; that these forms were rigidly observed; that they were living forms; not merely forms, but substance, not shadows, but realities; and that, according to the practice at the period when Bishop Fell lived,—a bishop who knew the practice well,—not only were the forms carefully gone through, but opposers *did* appear, (for he expressly states that they sometimes did,) the question was gone into, and examined judicially, and there the inquiry was not only as to the process of election itself, but as to the character and fitness of the elected person.

Mr. Justice PATTESON. What is the date of that?

Mr. *Badeley*. 1669; and therefore it brings down the evidence chronologically to a much later period than that of Cranmer. We have already seen, for I have passed it by in chronological order, the case of Bishop Mountague, which has been dwelt upon so much by others, that I am unwilling to touch upon it again. But I would mention to your lordships this fact, that there is another account of it in the Life of Archbishop Laud; and there the account is rather more full than it is either in Burn or in Collier.

Mr. Justice COLERIDGE. Is that in Dr. Heylin's Life?

Mr. *Badeley*. Yes, in Dr. Heylin's Life of Archbishop Laud, p. 175. He says, "It is an ancient custom that the elections of all bishops in the province of Canterbury be solemnly confirmed by the archbishop or his vicar-general, in the court of the Arches, held in St. Mary's Church in Cheapside, commonly called by the name of Bow Church; at and before which confirmation there is public notice given to all manner of persons, that if they have anything to object, either against the party elected, or the legality of his election, he should come and tender his exceptions at the time appointed, or else for ever after to hold his peace." Heylin then states the same things, and the same result, and pretty much as they are given in the other books; but the account is rather more at length. And I mention this, because some doubt was attempted to be thrown upon that case. It is an important case, as it shows the practice and understanding which prevailed at that period; and Dr. Heylin's history is that of a person who, from his intercourse with the parties concerned, well knew what he stated to be true. And, at the later period of Charles 2, we have the valuable and conclusive testimony of Bishop Fell, in the passage which I have cited; thus proving that no change had taken place in these matters, for more than a century after the Reformation. My lords, do we want further

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plement; evi-
dencing the
practice in his
day.

evidence? Then we have it. It is brought down to a much later period, in a work that I have before me, a work to which considerable value is attached, that of Dr. Nicholls's *Commentary on the Book of Common Prayer*. It is a supplement to his work, and published at the end of the copy in my hand. The Commentary is explanatory and historical; and in the supplement he meets the various objections then made against our church, particularly those relating to the appointment of the bishops. He answers them much in the same manner as Bishop Fell, and brings forward the process in the election and confirmation of our bishops as a proof, (in answer to the Romanists) that they were only confirmed and consecrated after full and careful inquiry into their lives and characters. The date of this work is the year 1711; and he says: "The Romanists would make the world believe, that our bishops derive not their consecration from bishops, but from princes and parliaments; which is an impudent slander; for our kings do but what belongs to kings, and our bishops what belongs to bishops. As, in a vacancy, the king by the statute of 25 Henry 8, chapter 20, granteth to the dean and chapter (as of old time hath been accustomed) a licence called *congé d'elire* to proceed to election, with a letter containing the person's name whom they should elect; which being done and signified, the king gives his royal assent, signifying to the archbishop and bishops the name of the person elected; requiring them to confirm the election, and to invest and consecrate the person elected, using all ceremony and requisites for the same. Whereupon the archbishop and bishops, proceeding according to the ancient form, do cause all such as can object either against the manner of election, or person elected, to be cited to make their objections. When the validity of the election, and sufficiency of the person are by public acts and due proceedings judicially approved, then follows consecration, which is performed by a lawful number of lawful bishops, and that in such form as is required by the ancient canons." Then he speaks afterwards, in another part, about the confirmation of bishops, where he is replying to the Romanists of his day, who said that the confirmation ought to be by the Pope, and not by the metropolitan. "The confirmation of bishops was a good constitution for the avoiding of schism. And the council of Nice ordains, that through all provinces it shall belong to the metropolitan. And all the bishops in England are confirmed by their metropolitans, *and that by a lawful and orderly proceeding*. For when the dean and chapter, by licence from the king, have made the election, certified it under their common seals, and thereunto have obtained the royal assent, the metropolitan, with other bishops, by commission from the king, proceedeth to confirm it, *according to the canons*, sending out a public peremptory citation to summon all personally to appear, which can object anything either against the party elected or the form of election. And when, *after due examination and judicial process*, they are both found consonant to the ancient canons, he confirmeth the election. Thus it is clear, that all the bishops of England have canonical confirmation, and withal that the Pope in challenging this unto himself transgresseth the canon, and usurpeth the right of the metropolitan." Now this is a direct appeal to the prac-

tice of that day, and an appeal of the utmost value, because it is evidently meant as a conclusive answer to the objections which were then raised. Dr. Nicholls says, "We do examine into the conduct of our bishops, and that according to the canons, and according to the ancient rule; and therefore you cannot impute to us that we do not take care to have that proper investigation which the ancient discipline and primitive order of the church require." And thus the system has been continued uniformly to our own times. We had one or two more recent instances mentioned yesterday where objections were made, or would have been made, to confirmations. And I believe in the case of one right reverend prelate of the present day, objections were actually offered on the ground of certain canonical disqualifications, which were afterwards withdrawn, or overruled. My lords, we have, through all these different periods, the ancient process maintained. We see it continued almost in its original form, and in all its solemnity, down to the present time. I would ask, is there no value to be attached to this? And when you find that up to the period of the last century, these forms were appealed to by the controversial writers of the church of England, as living and subsisting proofs of the church of England maintaining primitive discipline; when they point to the well known fact of opposers being allowed to come in, and actually making objections; when you see all this, can you for one moment doubt that confirmation is and always has been a reality, and not merely a reality, but a most important one? Can you for one instant maintain it to be a sham? To assert this, is to contradict all history, and all precedent, to give the lie at once to all the testimony we can collect. And, my lords, if we have not many instances in modern days of opposition actually carried out, perhaps a reason may be found for that. During a very long period of our history, from the time of Charles 2, down to the last century, the nomination of the bishops was much more in the hands of the sovereign than it is understood to be at this moment. The crown nominated less through the intervention of the prime minister, and more on its own motion. We know of two kings, Charles 2 and William 3, who were both so convinced of the great importance of selecting proper persons for the office of bishop, that they issued two commissions, which are published in Dr. Cardwell's *Documentary Annals of the Reformed Church of England*; one of them dated in 1681, the other in 1700; and by these the sovereign did actually appoint certain persons, bishops, and men on whom he placed the most reliance, for the sole purpose of investigating and ascertaining the fitness of any person recommended for promotion to a bishoprick. And though these commissions do not appear to have been renewed, or continued afterwards, they are evidence of the care taken by the crown that no improper person should be nominated in the first instance; and probably the moral effect of those commissions did not expire with the commissions themselves, but the successors of those sovereigns felt how much importance and stress was laid upon that matter by their predecessors, and they were accordingly careful of the nominations they made. And, my lords, I believe that this caution continued to the last century. George 3

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The system has been continued to our own times.

Reason for the dearth of instances of actual opposition in modern days.

Till the last century, less ministerial intervention in nomination to bishopricks.

Commissions issued by Charles 2, and William 3, for investigating fitness of proposed bishops.

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Care of George
3 in the choice
of bishops.

The power of
objecting not
obsolete, be-
cause not re-
quired to be
exercised for a
long period.

Parallel Cases.
Sheriff's court.

Court Leet ;
Court of Chi-
valry, &c.

Wager of
battle.

Action of debt
on simple con-
tract.

Action of
account.

Value of an-
cient forms.

was known to be very attentive to the choice of bishops in his reign. And thus we are furnished with a reason, and that a very material one, why there should be few, if any, instances of opposition. If the persons elected were chosen with such care, they were not likely to give occasion to objections: they were not liable to be challenged for any particular offence. The proceedings in Bow Church would in such cases really be "*pro formâ*:" there would be no objection made; and the opposers, though called, would not appear. And, my lords, I would ask, supposing these proceedings to have been, from any such cause, for a long period, rather formal than otherwise, do they become in consequence obsolete, or inefficient, when a case arises in which they are really necessary? Is a solemn judicial proceeding to be abrogated or annulled, because for a while there has been no need to resort to it for protection? Is it to be considered dead, because it has been dormant? Will the mere disuse of any court destroy the court itself? Surely not. Circumstances of that sort have occurred in our own experience: we know that the sheriff's court, the common county court, had for many years become a perfect nullity; that its jurisdiction had almost become a matter of history; but still it had not ceased to exist; its jurisdiction and its process remained, and might at any time have been resorted to; the right of parties to sue there was still the same, and this court would have given its assistance to enforce that right. The same may be said of some other courts, as the court leet, the court of chivalry, and others: though long disused, they are not destroyed. Then we have had particular modes of trial, and certain forms of action, which had been almost obsolete for centuries, which were notwithstanding ready at any time to be adopted, and some of which have since been revived. The case of wager of battle (*p*) astonished every one when it was revived a few years ago; but it was considered and found to be a real subsisting process, a thing which had effect in law, and could not be got rid of without an act of parliament (*q*). Take another more familiar case, the action of debt on simple contract: we know that it was scarcely ever used; but did that destroy the action? Certainly not. There is also at this very day another form of action which is very seldom heard of, the action of account: is the action itself destroyed? By no means; but because there is another remedy more generally available, it is less wanted; but still it may be used, when desired. Many other examples of the same kind might be adduced, from which it is clear beyond all question that the mere disuse of a court, the mere disuse of a judicial process will not destroy them; and if the court or the process be not expressly taken away by act of parliament, it remains, and may at any time be put in force: its energies may be called into action, when a proper case arises. And that is one great use of preserving ancient forms, and not allowing them to be broken through or discarded; because so long as they remain, they serve as a safeguard for other objects; though they may seem to be mere shadows, they have a substance behind them, and may be beneficially applied

(*p*) Ashford v. Thornton, 1 B. & A. 405.

(*q*) 59 Geo. 3, c. 46.

when the occasion occurs. And this we should find to be true with respect to the process of confirmation, even if it had been long disused as a means of opposing improper episcopal appointments. But we have seen that it never has been treated as a mere form: we have positive evidence of its practical efficacy, and of objections made from time to time; and if this has been less frequent of late, it may in great measure be attributed to the care which the crown and the government have taken in their nominations. We know, however, of one instance in which the apprehension of opposition at Bow Church actually prevented an improper appointment; that of Dr. Rundle, which was mentioned by my learned friend Dr. *Addams* (r). Dr. Rundle would have been opposed, and the government withdrew him, because they knew that such opposition would have been an effectual bar to his confirmation. What thus happened with respect to Dr. Rundle is most important testimony in my favour; for it shows that, at that time, confirmation was felt to be no sham. My learned friend, Mr. *Hill*, with a sarcastic tone remarked (s), "what misery Ireland must be in, and how dreadful must be the state of matters there, and in the Isle of Mann, where there are no confirmations of bishops!" But I think my learned friend was rather unhappy in his allusion to Ireland; for as it was found that Dr. Rundle would not be able to stand the ordeal in Bow Church, the minister of the day, in order to avoid that difficulty, sent him over to Ireland; and he was actually made a bishop there! So perhaps it would have been better, if the right of election by the dean and chapter, and the confirmation consequent upon that, had been preserved in Ireland as it is in England. And as it has been preserved in England, we have more reason to be thankful for it, and to uphold it in all its strength. I should have thought that the state of the Irish church historically, from the time of Queen Elizabeth downwards, would have been sufficient to induce my learned friend to keep that in the back ground: for I believe it is generally allowed that there is no greater scandal and disgrace to the government of this country, in the last century at least, than the state of the Irish church, and the manner in which its bishopricks were disposed of, and its highest offices frequently given to persons who were utterly unworthy of them. And therefore, when my learned friend alluded to Ireland, it seems to me that he was treading on very tender ground. And with respect to the Isle of Mann, I believe my learned friend was rather unfortunate in his instance; for the bishop of Sodor and Mann is, or at all events always used to be, confirmed in the regular form by the archbishop of York. There is one such confirmation particularly mentioned by *Strype* in his *Life of Archbishop Grindal*.

The *Attorney General*. It is not so now.

Mr. *Badeley*. That I do not know. If it is not, so much the worse for the Manx church.

My learned friends have argued, that the principles of the Reformation are at stake in this matter, and that those principles require that this statute of Henry 8 should be construed strictly,

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Case of Dr. Rundle.

No election or confirmation in Ireland.

Scandalous appointments to bishopricks frequent there.

Confirmation of the bishops of Sodor and Mann.

Strype's Life of Archbp. Grindal.

The principles of the Reformation not involved in the present question.

(r) *Supra*, p. 299.

(s) *Supra*, pp. 198, 200.

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Or, if involved,
identified with
the cause of the
opposers.

An error to
suppose that all
the powers for-
merly belong-
ing to the Pope
are transferred
to the crown.

so as to prevent all opposition to the confirmation of a bishop. And I think that one of the learned commissioners at Bow Church ventured to make some such assertion (*t*). My lords, I beg leave to deny that doctrine altogether. I deny, most positively and emphatically, that the principles of the Reformation are at all involved in this question. How can they be? Whether before or after the Reformation, it was equally the duty of those who had the right to make these appointments, to select only the most fit persons to be bishops of the church. It was equally the duty of those who had the right of opposing to object to an improper appointment. Their duty and their interest in this respect must be the same since the Reformation, as it was before. How can the Reformation have made any difference in that? Such a notion is really absurd: it is contrary to common sense. But, my lords, I will go further; and I will say, that if the principles of the Reformation are at all involved in this case, they are much more thoroughly and completely identified with the right for which I am contending, and with the cause of those persons whom I have the honour to represent, than they are with that which is advocated by my learned friends on the other side. For, my lords, what were the principles of the Reformation? Certainly not the transfer of infallibility and absolute dominion from the Pope to the sovereign of this country. Not a mere change of rulers, the despotism remaining the same. But if there be any truth in the writers of that age, or any meaning in our statute book, the object of the Reformation was to apportion to the state on the one hand, and to the church on the other, those rights and duties which respectively belong to each; to give to the state and to the temporal sovereign that which was their due; and to secure to the church and to the hierarchy those powers which undoubtedly belong to them: "to render unto Cæsar the things which are Cæsar's, and unto God the things that are God's." These were the doctrines put forward by all the leaders of the Reformation; and they are those which our statutes and our history declare. And what were the ancient rights of the crown on the one hand, and of the metropolitan on the other? The crown nominated, the metropolitan examined judicially the sufficiency of the person chosen. Each party had his own rights and his own duties; and if the restoration of the doctrines and practice of the primitive church was at all the object which the reformers had in view, as they always professed it was, then I apprehend the principles of the Reformation are identified with the cause of those who call upon your lordships to make this rule absolute.

My learned friends are quite wrong in supposing that all the power which belonged to the Pope was transferred to the crown. There is no statute which says so. There are many statutes that prove directly the contrary. Neither the power of dispensations, nor the doctrine of infallibility, nor spiritual authority, belongs or is attributed to the crown. The right of granting dispensations is given expressly to the archbishop by a particular statute (*u*): the

(*t*) *Supra*, p. 67.

(*u*) 28 Hen. 8, c. 16; repealed by

stat. 1 & 2 Ph. & Mar. c. 8; but revived by 1 Eliz. c. 1, s. 10.

rights of the archbishops and bishops are preserved by others. And in one of the statutes of Henry 8, there is a very remarkable preamble declaratory of the rights of the two estates, ecclesiastical and temporal. It is the statute of the 24th of Henry 8, chapter 12. After defining the authority of the crown, and its right "to render and yield justice," without being subject to any foreign power, it speaks of "the body spiritual having power, when any cause of the law divine happened to come in question, or of spiritual learning, then it was declared, interpreted, and showed by that part of the said body politic, called the spirituality, now being usually called the English Church, which always hath been reputed, and also found of that sort, that both for knowledge, integrity, and sufficiency of number, it hath been always thought, and is also at this hour, sufficient and meet of itself, without the intermeddling of any exterior person or persons, to declare and determine all such doubts, and to administer all such offices and duties, as to their rooms spiritual doth appertain." And then it makes provision for checking the interference of the Pope, and securing the authority of the archbishop's courts. But the matter does not rest there. Look at the doctrine of Lord *Coke*; look at the very authority which my learned friends cited the other day (*v*), the case of *Caudrey*, what does it say? Why it says expressly, that the intention of the statutes of Henry 8 and of Elizabeth was, to restore that which was the original rule, to give to the crown its original rights and prerogatives, to give to the church the same; to confirm the old ecclesiastical laws of the realm. Then, if so, if my Lord *Coke*, in commenting upon these very statutes, declares that this, and this alone, was their intention, I shall be glad to know how my learned friends can contend, for a single moment, that it was the object or the effect of anything done at the Reformation to give to the crown all that the Pope possessed, or in fact anything more than that which had originally belonged to it. And if the church was intended to regain its rights, and (when appeals to Rome were cut off) the jurisdiction of the archbishop's courts was confirmed, surely we are entitled to say that the Reformation, so far from destroying the power of the metropolitan, with respect to his suffragans, has really restored and affirmed it, and that the archbishop's court at Bow Church possesses its ancient jurisdiction, and may and ought to exercise it, and hear and examine the objections duly made. If the Pope, as was alleged, had usurped upon the church and upon the state, and the Reformation was meant to destroy that usurpation, and to vindicate the rights of each (and this is all that our legal and ecclesiastical writers assert), there can be no doubt that the true construction of all the statutes which were passed at that period, is that, and that only, which most effectually carries out this principle, and restores to the spiritual, as well as to the temporal, power, that which was previously, and is inherently, its own.

My lords, we have heard a great deal from the law officers of the crown respecting the prerogative. And certainly, the language that has been held on that subject (coming particularly from such a quarter as my learned friends opposite) has surprized me; for it

(*v*) *Supra*, p. 242. See also pp. 313, 315.

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Mr. Badeley's argument.

Stat. 24 Hen. 8, c. 12.

Coke.

Caudrey's case.

The object of the stats. of Hen. 8 and Eliz. was the restoration of the ancient prerogatives and rights of the crown and church.

Exaggerated notions of the crown's prerogative put forward on the other side.

Regina v. The Archbishop of Canterbury.

Mr. Badeley's argument.

The prerogative not in question here.

The rights of the church and the people guaranteed by Magna Charta.

Examination by the bishop of a clergyman presented to a crown living, no invasion of the prerogative.

Repeal of letters patent no invasion of the prerogative.

So, the prerogative unaffected by opposition and inquiry at confirmation.

would have done credit to the time of king James 1. Some went so far as to say, that the crown could do away altogether with the election by the dean and chapter; that it could in fact supersede or dispense with the provisions of the statute (*w*). But what absolute power has the crown, or what power at all, similar to that which the court of Rome exercised or claimed to exercise? And how is the prerogative affected? It is not really a question of prerogative. We are told by Lord *Coke*, that "no prerogative can be claimed contrary to Magna Charta." And these rights which we claim for the archbishop on the one hand, and for the people on the other, in the confirmation of bishops, existed long before Magna Charta; and Magna Charta solemnly confirms the rights of the church and the subject. But what, after all, is the prerogative of the crown? Whatever it is, we are told that it is for the public benefit; that it is not to be exerted to the prejudice of the subject; that it cannot be presumed to destroy any pre-existing rights, or to require an act of parliament to be construed in a harsh or unfair manner. But, my lords, how is the prerogative of the crown interfered with here? Is it supposed to be interfered with in the case, which was put by Dr. *Addams* yesterday (*x*), of a person nominated to a living by the crown, and presented by the crown to the bishop for institution? When such a person goes to the bishop to be instituted, the bishop examines him, and ascertains his fitness and his qualifications. He is bound to do so; and if the clergyman is unfit or unqualified the bishop is bound to reject him, and he does reject him; and the crown must then find another person to fill the living, who must also be examined by the bishop, and is subject to his approval. But is the prerogative affected by this? Who ever heard of such a notion? And yet, if the prerogative is in danger when the metropolitan examines into the fitness of a bishop elect, why is it not as much in danger when a bishop examines the presentee of the crown on institution to a living?

Take again the case of letters patent. We have proceedings, from time to time, in this court and elsewhere, for the repeal of letters patent. Why? The reason assigned is, that "the crown has been deceived in its grant." If the crown may be deceived in its grant in other letters patent, why not in those which nominate a bishop? Is the crown to have an infallibility with respect to the appointment of bishops, which it has in no other thing? And in proportion to the more eminent importance and solemn responsibility of such appointments, is the crown to be less open to information, less open to correction, than it is in the insignificant grant of an ordinary patent of privileges? If the prerogative of the crown is not interfered with by such proceedings as those which are instituted to repeal letters patent, when they are erroneously granted for inventions, or copyrights, or such things, I should be glad to know, how it is more affected or interfered with in a case of this kind? For what does an objector at confirmation come forward to do? To show that great scandal exists against the person who has been elected to the office of bishop, the most important and sacred office in the church;—to suggest that "the crown has been deceived in its grant;" that it has

(*w*) *Supra*, pp. 169, 170.

(*x*) *Supra*, p. 280.

fixed upon a person of unsound belief, or evil life, or against whom there is that scandal which at all events ought to be inquired into by his spiritual superior. How, my lords, can the prerogative be affected by such a proceeding as that? Surely it is rather in aid of the prerogative than to its prejudice; because, if the prerogative is in the crown for the benefit of the subject, (and this all our writers affirm) what can be more for the benefit of the subject than that an appointment of a nature so solemn, so important, so high, so responsible, should be thoroughly and deliberately weighed; that it should not be made without the most anxious care; and that till the very last moment, when it is to be rendered complete, it should be open to all persons to show, that the man so selected has been improperly selected, and is unworthy of the office designed for him? Even for the sake of easing persons' consciences, and quieting differences, and preventing discomfort and disorder, it is right that such an investigation should be made as will set the matter at rest one way or the other. For that after all is the whole that is asked. Nothing more is claimed than the exercise of a right which is to aid the crown in doing the very thing which the prerogative professes to seek.

Then, my lords, if there is no invasion of the prerogative, is there any injustice done to any other person? Have my learned friends on the other side shown any wrong inflicted on the bishop elect? He surely has no right to complain. He is duly apprized beforehand of what will happen. He knows of the citation that is to be made, that certain forms will be gone through, and that persons will be challenged to come forward, and oppose him. He therefore is not taken by surprize by the fact of opposition being made. And if it be made, he is not put into an unfair position. He has full opportunity to meet the charge. An investigation of its truth or falsehood is the very object of the opposition, the very purpose for which the court is assembled. Does it follow that the court is to decide at once? Clearly not. Instances of confirmation show (and among others, that of Archbishop Parker) that the court may be continued from day to day: there need be no undue speed, no such breathless haste. The whole inquiry may be most calm, and dispassionate, and impartial. So that there is no danger of any injustice being done to the bishop elect.

But, my lords, is the bishop appointed to the office for his own benefit? God forbid! He is appointed for the benefit of the Church; and it is not with reference to the interests of the individual, that such an appointment is to be looked at. It is for the interests of the church, for the well being of those who are to be submitted to his jurisdiction, that the appointment is to be made at all. And if it can be fairly shown, upon a legal and judicial inquiry, that things exist which ought not to exist, in his life or history, surely common sense, and common reason, and the whole history of Christianity show, that such a person ought to be put away.

So that looking at the question in any point of view; looking at it with reference to the crown, with reference to the church, with reference to the individual, with reference to the diocese to be committed to him; in each and all of these, the same aspect presents itself, the same voice is heard; proving that such a process is essential

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Archbishop of
Canterbury.

Mr. Badeley's
argument.

No injustice
thereby done
to any other
person.

None to the
bishop elect.

The good of
the church a
paramount con-
sideration.

In every point
of view, the
process of in-
quiry for the
good of all
parties.

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Archbishop of
Canterbury.

Mr. Badeley's
argument.

Mischief
that may arise
from a contrary
course.

Supposition of
a layman nomi-
nated to a
bishoprick.

A system of
non-inquiry as
likely to injure,
as to advance,
the principles
of the Reforma-
tion.

to the best interests of all parties, and to the maintenance of religion itself.

Then, my lords, look at the enormous mischief which may arise from any contrary course; the immense danger that must occur, if this process is not allowed. You may have a person appointed rightly or wrongly, as far as the minister himself is concerned. He may appoint him conscientiously, but in ignorance; or he may do it from a bad motive, for party purposes. He may appoint a person totally unfit, not only unfit in morals and in life, but also canonically and legally disqualified. The minister may be very anxious to promote such a person, and, in order to effect his object, to get the appointment completed as speedily as possible. But such a person ought not to hold the office, whatever promises he may make at his confirmation as to his future conduct. Ought not therefore an opportunity to be given for an inquiry, in such a case as that?

Take the case again of a mere layman. As the matter stands, a layman might be nominated by the prime minister of the day. For it has been generally supposed (I myself know that the opinion is entertained in very high quarters in this country) that a layman may be consecrated a bishop *per saltum*, without going through the inferior orders. What would be the case there? You might have a bishop of the church of England actually forced on to consecration, without having subscribed the Thirty-nine Articles of Religion at all. Such an instance might easily happen, under a corrupt or unprincipled minister, (and we have seen such in this country, in former days). This bishop would then at once be a judge, not only of the morals, but of the doctrine of the clergy committed to him. He would exercise an arbitrary control and absolute power over a great portion of his clergy. Every curate in his diocese would be submitted to him, and might be removed at his pleasure. Every person about to be instituted, or wishing to transfer himself from one benefice to another, supposing he had to take a fresh one in that diocese, would have to be examined by this bishop, before he could be admitted to his new preferment. And thus a bishop who had never entered into those engagements which the church of England requires from all her inferior ministers, might be exercising spiritual jurisdiction, determining questions of doctrine, and holding an entire control over the habits and fortunes of his clergy, without any test at all of the soundness of his own principles. Can any rule or practice which is to sanction this, be allowed and adopted in this court? I apprehend, my lords, that your lordships cannot entertain such a proposition for a moment.

If, as we have been told, the principles of the Reformation are at all concerned in this matter, that argument will cut two ways. Suppose a minister of the day anxious, not upon the side of presbyterianism, but upon the side of Romanism, and instead of being half a presbyterian, or having certain rationalistic views, being more than half a Roman Catholic, of course his object would be to place in the dioceses of this country, not persons whose faith on fundamental doctrines was unsound, not dissenters or rationalists, but men who were actually almost Roman Catholics. And suppose such a minister remained in office for a very long time, as we know ministers have

sometimes remained, he would have half the bishopricks in England and Wales at his disposal; and he would be able to fill them with persons holding perhaps almost all the peculiar doctrines of the church of Rome. So that, if the argument of those who profess such concern for the interests of the Reformation is to be allowed, it is evidently suicidal; for it applies with quite as much force against those who urge it, as for them. The principles of the Reformation are quite as likely to suffer, as they are to be supported; for the prime minister of to-morrow is perhaps almost as likely to favour Romanism, as the one of to-day may be to lean to puritanism or presbyterianism.

And, my lords, look what you do if you discharge this rule. You not only let loose the prerogative, and give an unrestricted power to the minister of the day, to nominate and appoint whom he will; but what do you do to the archbishop? You annul his ancient jurisdiction. You destroy his inherent rights: you make them of no effect. You convert the archbishop himself, in his metropolitan character, into a mere machine, as merely a machine as the veriest clerk in the office of the Secretary for the Home Department, who is concerned in preparing or copying the letters patent for the promotion. He is a mere registrar, nothing more; a mere machine. And you will call upon him, as such, to perform the most high, the most solemn and sacred function of the Christian religion. You will compel him to prostitute his office, (for it becomes nothing less), at the beck of the minister of the crown. You will call upon him to consecrate any person, good, bad, or indifferent, be he infidel, be he dissenter, be he Romanist, be he what he may, whatever objections there may be against him, however scandalous his life or morals, however unsound his faith, according to the doctrine which has been upheld by my learned friends. There is no alternative; no person can appear in court to make any objection at all; no objection however grave, however well founded, can be entertained by the archbishop. The decree of the prime minister, and of the crown, is final and conclusive. And the archbishop has no more power in the matter than the humblest person in the whole realm. Can that be common sense? Can that be common reason? Can that be the English constitution? Can that be religion? Can the rights of the church and the interests of the highest order of the clergy be so tampered with and so destroyed? Can the dearest and most sacred interests of the people of this country be thus lightly put aside and annihilated?

My lords, I am quite sure that, in this court, where so anxious a care is always shown for respecting the rights of all parties, I am quite sure that this doctrine can never be allowed. I feel confident that your lordships will give effect to the ancient rule, the ancient law of this realm. And with these observations, I leave the case in your lordships' hands. I leave it, my lords, with confidence, though certainly not without anxiety; for it is impossible not to see and know the intense interest which is felt, from one end of the kingdom to the other, in the issue of this most important question; a question in which all parties are interested; which is not a party question, either in the church, or out of the church, but which all

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Canterbury.

Mr. Badeley's
argument.

Metropolitan
converted into
a mere ma-
chine.

Regina v. The
Archbishop of
Canterbury.

Mr. Badeley's
argument.

Lasting im-
portance of the
court's decision
on the present
question.

regard as one of vital moment, and for which they are deeply anxious that it should be properly decided.

My lords, the question whether Dr. Hampden is fit or unfit for any particular bishoprick, shrinks into absolute insignificance, when compared with the question now before your lordships. The influence for good or evil of any single bishop can be but limited in its extent, and short in its duration. He will soon die and be buried; and the good or the evil which he may do may in a few years cease to be felt. But, my lords, the appointment of bishops, the right of the crown to nominate without appeal, and without control, and without any responsibility at all, is to continue for ever. The injury therefore to the church of England, if its pastors are thus to be forced upon it at the mere beck of the prime minister of the day, will be incalculable; for a succession of prelates may thus be perpetuated, who may be a disgrace to Christendom. God forbid, my lords, that that should ever be so! but undoubtedly it may happen; it may be even more than possible, if your lordships discharge this rule. But I need not dwell longer on this subject; for your lordships cannot fail to see the terrible results which may ensue. I do therefore most earnestly and anxiously implore your lordships, in the name of the church, in the name of the state, and in the name of our common religion, to look carefully and anxiously at this question, with that religious tone and deep feeling which I am quite sure that your lordships possess; and, in doing so, I am confident that your lordships will make this rule absolute.

Sir Fitzroy
Kelly's
argument.

Sir *Fitzroy Kelly* (*y*). My lords, I have to solicit your indulgence for a very short time only, while I proceed to address your lordships upon this most important case; sincerely assuring the court, that, after the long and able discussion which it has already undergone, and whilst it is with some personal difficulty, and perhaps risk, that I can address your lordships at all, nothing less than the high and commanding importance of the question involved in this case, could induce me to occupy one moment of your lordships' time, even by offering a single sentence further in this argument.

Importance of
the present
case.

But, my lords, I do consider the importance of this case to be unspeakable; so far so, that I must say, I am greatly relieved from the anxiety and the distress which I should otherwise feel, at my own inability, at this moment, to do justice to it, by the conviction (if I may humbly venture to use that word), arising from its all commanding importance, that unless all of your lordships should feel every point in it to be wholly clear and free from any approach to a doubt, (which, however, the present state of the argument seems to contradict), you will do as your lordships have always done,—therein imitating the example of the wisest and greatest of your predecessors,—abstain from finally determining a case involving such considerations and such consequences, upon a mere motion on affidavit; and that you will decide to put it into such a course of inquiry, as to submit the whole question, if it should become necessary, to the highest tribunal in the kingdom.

(*y*) In consequence of indisposition, court, on the two days preceding.
Sir Fitzroy Kelly was absent from Vide *supra*, p. 204.

For, my lords, what are the considerations in this case? If it has been truly urged by my learned friend, the *Attorney General*, that the prerogative of the crown is assailed, or if the extent of the exercise of that prerogative is to be considered and defined in this case, surely your lordships will not forget that this case also involves the highest interests of the church and people of this country; that it involves the character and the efficiency of its greatest and most exalted ministers; that it involves the respect and reverence in which they are henceforward to be held, and the confidence to be henceforth reposed in them by their entire flock, the people of this country; that it involves, moreover, not only the temporal interests (for that were little) of the clergy of the diocese of every bishop, but the eternal interests of the whole Christian community of this country. And, my lords, this is the case which the law officers of the crown, and those whose able assistance they have had, are to contend before your lordships ought to be finally determined here, on a mere motion upon the affidavit which is before the court!

My lords, what is the real nature of this question? It has been said, on the part of the *Attorney General*, that this is a question touching the prerogative of the crown, and the prerogative of the crown only. My lords, I say at once,—I believe that I said it in addressing your lordships upon the motion for this rule,—I say, that we seek not to deny, or to impeach in anywise, the prerogative of the crown. We admit the prerogative: we admit the clear and exclusive and unassailable right of the crown to nominate the clergyman who shall be elected and chosen to any bishoprick in this kingdom. But I must intreat your lordships to bear in mind, whatever degree of consideration you may think it right, in this stage of the argument, to bestow upon this case, that there is a great and ever prevailing distinction between the right (whether it be in the crown, or in the subject, in the people in general, in the clergy, or in the Pope,) to elect or nominate a bishop, and the ecclesiastical privilege and Christian duty of the archbishop, or of some other high minister of the church, to examine, and (if found fit and sufficient) to confirm, and so to perfect the bishop in his office. The right of nomination is one thing; and the process of confirmation is another. The one may be in lay hands: it may be in the hands of the Pope, or of the prince, or of the people. But the other must be an ecclesiastical matter, touching the rights and most solemn duties of the church, and must be exercised by an ecclesiastical authority.

My lords, am I advancing any new doctrine in this case? I must beg leave to remind your lordships, that while, on the one hand, I deny not nor impeach the power of the crown to nominate, at its pleasure, any one whom it shall deem fit and right to make a bishop in this country, the right and solemn duty of the archbishop, or of some high ecclesiastical authority, to go through the process of confirmation,—to examine, and, only if upon examination and inquiry the person proposed be found fit and sufficient, to approve and confirm,—has existed in every Christian community on the surface of the earth, has existed undenied and unquestioned, and has been acted on—with variations, indeed, in point of form, in various times, and in various countries, but acted on—solemnly,

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Sir Fitzroy Kelly's argument.

The prerogative of the crown not sought to be impeached.

Distinction between the civil right of nomination, and the ecclesiastical duty of confirmation.

The ecclesiastical process of confirmation has always existed in the Christian church;

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Archbishop of
Canterbury.

Sir Fitzroy
Kelly's
argument.

Commencing
in the Apos-
tolic age;
And since
universally
practised.

Never a mere
form.

Parker's case.

The civil right
of appointment
made absolute
in the crown,
without affect-
ing the eccle-
siastical acts of
confirmation,
&c.

Object and
policy of stat.
25 Hen. 8,
c. 20.

deliberately, and undenied, from the time of the Apostles to this hour in which I am now addressing your lordships. It began, my lords, at a period which, I understand, has been referred to in the argument: it began in the time of the Apostle Paul, who imposed that duty, under the divine authority itself, upon Timothy, and upon Titus, to whom his Epistles were addressed. It has continued without change or variation, except, indeed, in mere matters of form! It has continued to be exercised, to be solemnly performed by the heads of the church, in every Christian country, under all circumstances, and even among all sects, and in all ages of religion, down to the present time in which we are considering this question. And it is this, one of the most solemn acts of the church, one of the most solemn proceedings or processes in which mankind in general can be interested, that by the law officers of the crown is to be denounced or rejected as a mere trifle, a vision, an unsubstantial form! My lords, I deny that it has ever been a form; and I trust your lordships will not now, for the first time, hold it to be a form. And I cannot here, at this moment, in considering this question, but ask your lordships, if this be a form, if the citation of opposers, the hearing of opposers, and the inquiry, through testimony, into the fitness of the individual about to be made one of the highest ministers of the church, be itself a form, how, with reference to the terms of this statute, and to the whole of the arguments of the *Attorney General* and my other learned friends, any other part of this ceremony, except the mere act of confirmation, which he declares to be a mere ministerial act, is not likewise to be treated as a vain, frivolous, and insignificant form? And if that be so, among other things, what actually took place in the great precedent, which amounts to an authority, as being the first case after the re-enactment of this statute, in the first year of the reign of Elizabeth (*Archbishop Parker's case*), was altogether a form; and so the taking of an oath upon the holy Gospel itself is to be denounced or treated with contempt, as a form also. Have then our sovereigns and legislators, have the archbishops and the hierarchy of our church, in all times from Elizabeth to the present hour, indulged in that which to call only a form were impious in the extreme? Have they administered oaths? Have they caused other persons to take oaths upon the holy Gospel, in what is to be called a mere matter of form, a mere and vain matter of ceremony? My lords, I cannot understand the ground upon which such an argument can be seriously put forward, in this high and Christian court of justice.

But, my lords, let us see then what is the distinction to which I am intreating your lordships' attention, between the two important portions of the act which perfects a clergyman of the church in the office of bishop; that is, between the nomination or the election (by whichever of those modes, in the first instance, the individual is to be determined), and the ecclesiastical process, which afterwards follows, of confirmation and consecration. And then your lordships, looking to what it was before, will have to consider whether this act of Henry 8,—though, as I freely admit, it settles the question of election and nomination, beyond all doubt,—touches, or in any way affects, the process of the confirmation or the ceremony of

consecration, except in so far as the interference of the Pope made a part of the one process or of the other ceremony. And I think I shall be able completely to satisfy your lordships,—not upon authority, for there is no authority bearing upon the question, except those numerous authorities to which you have already been referred, all showing that this is a part, and a material part, of the process of confirmation,—but I think I shall satisfy your lordships, upon the plainest principles of reason, applied to the ordinary meaning of the English language, in this statute, that what the statute did (and I admit, and I rejoice in believing, it did this most effectually), was to destroy the power of the Pope, and the influence and right of interference on the part of the Pope, in this country, and to confer, inalienably, and for ever, the absolute and peremptory right of election or nomination (by whatever name it is to be called), of the person to be made bishop, upon the crown; that is, leaving the Christian or ecclesiastical process of confirmation and the ceremony of consecration altogether untouched, except, as I have already observed, by excluding from it all reference to or interference on the part of the church of Rome.

My lords, the mode in which nomination has been made, has varied in many countries, and through many generations. There can be no doubt that, in the very first age of the Christian church, the immediate admission—for it could hardly in those days be deemed an appointment; for there was neither benefit nor advantage in it, but only toil and danger; but the admission—to the highest, as to the lowest, offices in the church, was in the Apostles themselves, or in those high and distinguished members of the church, standing in the place of our archbishops and bishops, to whom they committed that very solemn and important duty. As the Christian religion spread, when the people of various countries, and the princes and sovereigns of those countries, became interested in the question, then indeed bishops were elected, sometimes by the people, often subject to the approbation of the princes, and, throughout the whole reign of the court of Rome, in Roman Catholic times, of the Pope, either by direct nomination, or at least by confirmation; so that in various countries, and at various times, the right of election and nomination has thus varied.

In this country, I admit, that the account given by my learned friends, of the history of the nomination of bishops (z), is perfectly correct; except, indeed, that, in the very earliest times, we have every reason to believe that it was subject to the approbation of the crown. It then passed to the crown altogether. And then, in the contests which took place in the time of Henry 1, and of John, if it did not become actually vested in the Pope, it was at least exercised by the Pope, even to the prejudice, and often against the will of the crown, as it was against the interests of the people. By various statutes, at last, it was declared to be in the crown; the Pope no longer having the nomination of bishops, and interfering only (but interfering most effectually) by requiring that bulls should be issued from the court of Rome, to authorize various portions of the pro-

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Canterbury.

Sir Fitzroy
Kelly's
argument.

Variations in
the mode of
nomination.

History of the
appointment of
bishops in
England.

(z) *Supra*, p. 124.

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Archbishop of
Canterbury.

Sir Fitzroy
Kelly's
argument.

Confirmation
invariably an
ecclesiastical
act, accompa-
nied by inquiry
into the party's
fitness.

The foundation
of the practice
laid in Scrip-
ture.

Ep. to Titus,
i. 3.

cesses and ceremonies which took place, and without which no bishop could be perfected in his office. The nomination, therefore, in this country, changing from the people to the crown, sometimes not actually according to law, but being exercised by the Pope, at last returned to the crown, but subject to the interference of the Pope. And then came the act of Henry 8; the object of which, when I refer to it (as I shall do shortly, for the purpose of calling your lordships' attention to the three or four points, touching this act, which have been raised in the argument), will be seen to be, to put an end most effectually to all interference on the part of the Pope, and to leave to the crown the absolute, sole, and exclusive power, not indeed of nominating bishops, (for that is not the form pointed out by this act), but of causing a particular individual to be elected; providing that none but that person should or could be elected, and then, that individual being elected and being approved by the crown, that he, and he alone, should be a bishop.

But, my lords, during all this time, what became of the question of confirmation? Without wearying your lordships, by again going through the authorities which have been cited in such numbers upon this occasion, I venture to say, that no one authority of any foreign jurist or canonist, or of any English jurist or canonist, or of any judge, civil or ecclesiastical, has been found, or can be found, to show that any bishop was ever confirmed, except under ecclesiastical authority; the exercise of authority involving an inquiry and examination into the party's fitness, by all necessary means for that purpose. There is no authority, no shadow of authority, in any country,—far less in this,—to be brought forward, showing either that the process of confirmation ever ought to have taken place, or that by any established usage it ever did take place, without such an examination into the qualifications and fitness of the bishop elect. There is none! But what do we find? My lords, we find that which is the foundation of the canon law throughout Christian Europe, that which is the foundation of the common law of this realm, that which is the foundation of the usage which has prevailed in this country unvaryingly, at least for 300 years, ever since the passing of this act of parliament,—we find in Holy Scripture itself, we find in the Epistle of Paul to Titus, that which laid the foundation for the custom and for the law which has since prevailed. I will not refer to what my learned friend, I understand, has already adverted to, the Epistle of Paul to Timothy. But in the Epistle to Titus, chap. 1, we find in the 3rd verse, the Apostle says, that the word of God had been in due times manifested through preaching, which was committed unto Saint Paul the Apostle (and by him unto Timothy), according to the commandment of God our Saviour. He then proceeds to point out to Titus the reason why he had left him in Crete; which was, so to set things in order, as to see that none but fit persons should be appointed to minister. He then proceeds again to state the qualifications of a bishop; that he must be blameless, and the other qualifications there stated. And among them (and here it is that the text of Scripture bears directly upon the question now at issue, namely, the question of fitness in point of doctrine) he enumerates, "Holding fast the faithful word, as he hath

been taught, that he may be able by sound doctrine both to exhort and to convince the gainsayers." Here we have the Apostle enjoining Titus to take care that those who are appointed bishops should be of sound doctrine, that they might refute and answer gainsayers, that their teaching might be pure, efficient, and holy, to the people of the church of God. And this has been unvaryingly acted on, now for 1800 years, in every Christian country. And yet it is now to be said, that this is to be regarded as a vain and useless form which ought to be despised!

My lords, what follows? That in all those countries, where the Christian religion had spread, it had become necessary to lay down some rules of church government; but which, however, were to be always founded upon the doctrine of Scripture, and the examples to be found in Scripture, where such could be found. Accordingly, in the council of Carthage, the Nicene council, and other early councils of the church, where some of the purest canons that ever were enacted passed and became the ecclesiastical law of the Christian world, we find that, substantially, the same process which I am speaking of was specially enjoined and ordained; and that, in all those councils, provision is made, first, for an examination and inquiry by the archbishop or bishop, or some high minister of the church, into the fitness of the person, and also, in many of them, for the citation of opposers.

Then we come to the canonists. And my learned friends here allege,—but it is a mere assertion, without a shadow of proof to support it,—that whatever may be found in the foreign jurists, the practice does not appear ever to have been adopted as law or usage in this country. My lords, we find, upon this point, that all the great jurists of Europe, *Lancelottus*, *Ferraris*, and *Van Espen*, (who has been cited by my learned friend, the *Solicitor General*), all agree, though not in the same words, nor precisely in the same forms, in pointing out this sort of process in the confirmation of bishops. But does it stop there? Do not we find, wherever the subject is referred to, wherever the confirmation of any bishop is referred to, and, more specifically, where the confirmation of bishops of the church of England is referred to, that the same doctrine is set forth? We find those very foreign jurists cited, as showing that the law is the same, in *Ayliffe*, in *Lyndwood*, in *Gibson*, and in *Burn*.

I agree that variations will be found. There was a time, when the name of archbishop did not exist, and when, consequently, no archbishop could be found. But when Christianity spread and became established in many parts of Europe, and when the different ministers of the church acquired the names which they now bear, we find that confirmation took place, being performed sometimes by an archbishop, sometimes by six bishops, sometimes by three bishops; often indeed (and hence occurs the only source of confusion, and even of doubt, which can be introduced into this case) by the Pope himself; but always, in every country, at all times, purely and exclusively by ecclesiastical authority; never by lay authority; never with lay interference; always by some high minister of the church, whether it were the Pope himself, or the archbishop, or any number of bishops. Always by some high dignitaries of the church

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The practice
enjoined by
early Councils.

The practice
affirmed by all
canonists,
foreign and
English.

Though the
form varied,
confirmation
was always an
ecclesiastical
rite.

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And observed,
as such,
universally.

One apparent
exception no-
ticed by Lan-
celottus;
where the Pope
himself named
the bishop.

The ecclesias-
tical rite of
confirmation
uninterfered
with by the

was the confirmation proceeded with; and always—though, as I have said before, varying sometimes in form—always substantially in the way pointed out by those various foreign jurists; and always declared to be part of the law, or, at least, the custom of this country, by the English jurists who have written upon the same subject.

And, my lords, this continued till the time of Henry 8. In Germany, where the bishops possessed great temporal authority, where bishops were princes, and in England, where the bishops were merely high dignitaries and ministers of the church, in whomsoever the nomination or election might be, confirmation was always an ecclesiastical act. In Germany, as your lordships well know, the election of bishops was nominally, though not really, in the people, and it afterwards devolved substantially on the Emperors of Germany; but even there, whatever may have been the mode of election, or the persons in whom the right of election was vested, confirmation was a separate and distinct process, and was always a matter of ecclesiastical jurisdiction. It was so, I say, at that time, in England also. It was so everywhere: confirmation was universal; with one single exception; and the reason for that exception accounts for what my learned friend, the *Solicitor General*, adverted to, when he called your lordships' attention to a passage in the very book we have cited, namely *Lancelottus*; who, in one part of his gloss, says, At this day such is not the case with bishops (a). Does not that very exception prove, when it comes to be considered, that confirmation was always a necessary and indispensable process, and that it was always an ecclesiastical process, that is a process performed by some high minister of the church, having the power, and supposed to possess the means, of inquiring into the fitness, in point of doctrine and piety, of the person to be confirmed? My lords, what was that exception? *Lancelottus*, who wrote in those early times, was himself a Perugian: he was born within the Roman states, and he wrote within the Roman states, and for the people of that country; and when he says, In our day this ceremony or process of confirmation does not take place, what is his meaning? Throughout the Roman states, the Pope, and the Pope alone, confirmed. The Pope named; the Pope admitted; the Pope inquired, or satisfied himself without inquiry, as to the fitness of the party; and the Pope confirmed. This very exception, therefore, shows that confirmation by the ordinary ecclesiastical authorities of the country was unnecessary, because the head of those authorities, the highest ecclesiastical authority in the church, in those days, (or indeed, in these days, in Roman Catholic countries), namely, the Pope himself, confirmed, with reference to the people of whom *Lancelottus* was speaking, namely, the people of the Roman states, the Pope's own temporal as well as ecclesiastical subjects.

And when my learned friend refers, I think, to some case in *Croke James* (b), where it seems to have been said, (it is no decision, but a mere dictum), that, at the common law, the king of this

(a) "Hodie hæc confirmatio non est necessaria." *Supra*, p. 183.

(b) *O'Brian v. Knivan*, Cro. Jac. 552; *supra*, p. 131.

country possessed the power of nominating bishops by letters patent, does that case show, or does any authority show, that the king has ever made and perfected a bishop in his office, without the ceremony of confirmation, except by statute, where an act of parliament steps in? It may be so in Ireland; but that case was cited to show that there had been introduced into the canon law of England some exceptions to what was the canon law throughout Europe. Does it show any exception? It touches only the right of nomination or of election, which I admit by this statute to be completely and perfectly in the crown; but it says not one word on the subject of confirmation. My lords, I want to see an authority, in the law of England, or in the law of any Christian country in the world, for a power in the sovereign (always excepting the Pope, who was the head of the church ecclesiastical, as well as of the state temporal) to perfect the title of a bishop, without the intervention of the church through the process of confirmation. There is absolutely none.

But again, when my learned friends say, that this is foreign law only, and that it was never made part of the law of this country, how is it that we no where find it asserted, by any judicial authority, or by any text writer, when alluding to this subject, that although the process of confirmation means confirmation in a certain manner and with certain forms in foreign countries, such is not the meaning of it in this country? My lords, on the contrary, wherever the subject is mentioned, we find that the law, as respects the whole process of confirmation, is treated as exactly the same everywhere; for not only is that the case in the text writers to which I have adverted,—and more particularly in the very learned writer, *Gibson*, in his *Codex*, to which your lordships' attention has so often been called,—but we find that, wherever any judges, sitting here, as your lordships sit here, have had incidentally to deal with the subject at all, they treat this process of confirmation as part of the law and usage of England, exactly in the same way as it is the law and usage of other countries of Europe. It was for that purpose, and that only,—not as a direct authority, but to show your lordships that the universal impression among judges, among the most learned in the realm in the common law, as well as among churchmen, was that the law and usage were the same here,—it was for that purpose that I cited (c) the case of *Evans v. Ascuthe*, from *Palmer* and *Sir William Jones*, and other books, in which it is reported. I cited it to show you, that when they were dealing with the question of the right of a bishop to his temporalities, and consequently were under the necessity of considering the various stages of the process by which a bishop can be perfected in his office, where it was essentially necessary that their attention should be minutely directed to those points, for the decision of the question before them, they have referred to the whole process after the election; they have referred to the confirmation of a bishop, as being precisely that which we say it always has been, still is, and ought to be, by the canon and the common law of this country, as well as by the law of other states.

Your lordships, in addition to this, in addition to what is to be

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statute law of England. *O'Brian v. Knivan.*

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Gibson.

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The usage has likewise con-

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tinued un-
changed from
the first year of
Elizabeth to
the present
day.

The stat. 25
Hen. 8, c. 20,
has made no
alteration in
the ecclesias-
tical rite.

Title of the
act.

The real ob-
ject of the act.

found in the text writers, and in the language of the common law judges of this country, will not forget, that, whether it be matter of form or otherwise, such has been the actual usage in this country, from the first year of the reign of Elizabeth, down to the other day, when the confirmation, or the proceeding towards confirmation, now in question, took place in Bow Church.

My lords, I turn now to the statute; because it manifestly appears from it, that what, upon historical authority, and upon the authority of all foreign jurists, and upon the authority of all English jurists, we have submitted as the process of confirmation, is, and ought still to be the law. And I now come to the consideration of the great question that ought to be determined, as touching this proceeding, namely, whether this act of parliament alters the process of confirmation, whether it dispenses with or nullifies any thing which, by the canon law of England, as well as of the rest of Europe, had theretofore formed part of the process of confirmation; or whether it is not entirely confined to the exclusion and destruction of the power and interference of the Pope, and the conferring of the nomination of bishops, by means of a compulsory election, exclusively and unassailably, upon the crown. I think I shall show your lordships, by a very brief reference indeed to the leading provisions of this act of parliament,—stringent and peremptory as I admit it to be (and I repeat my own satisfaction that it is so) as to the total exclusion of all interference of the Pope, and as to the conferring on the crown of the absolute right of commanding the election or nominating the bishop—that it leaves the process, the power, and the duty of confirmation, according to the doctrine of the Christian church, in the archbishops of this realm, exactly as it existed before, and exactly as it will be found that it has been exercised ever since.

Now, first, my lords, some criticism was offered upon my referring to the title of this statute. I really do not, in the slightest degree, rely upon the title. The title, as I find it printed, is, “An act for the non-payment of first-fruits to the Bishop of Rome” (*d*). I referred to it, only for the purpose of showing that from this, perhaps the almost immaterial commencement or heading of the act of parliament, to the last line or letter of it, it is all directed against the interference of the Pope of Rome.

But I will refer at once to that section which has been most pressed in the argument, as tending to show that the object of this act of parliament was not only to confer upon the crown the right of compelling the election of a particular bishop, not only to exclude the Pope from all interference either in the election or in any thing that followed the election of a bishop, but also to point out, to limit, and to define the processes and ceremonies which were to take place after election, and after the approbation of the crown had been signified of the election of the bishop, in order to perfect him in his office. It has been argued that, inasmuch as the act points out nothing of an opposite kind, but, on the contrary, strictly enjoins confirmation, under the penalties of a *præmunire*, therefore all that could by possibility interfere with such confirmation must be

treated as a matter of form, and rejected as unnecessary, and as rendered of no avail. That is the argument. Now, I think I shall show your lordships that, by the direct terms of this statute, in the very provision most pressed upon the court by the *Attorney General*, it is enacted, (and therefore it is made the law, if it were not the law before), that the whole process of confirmation and consecration is to remain in all things as it was before, saving interference by or reference to the Pope. For what is this 3rd section? "Forasmuch as in the said act it is not plainly and certainly expressed, in what manner and fashion archbishops and bishops shall be elected, presented, invested; and consecrated within this realm, and in all other the king's dominions, be it now therefore enacted.....that the said act and every thing therein contained shall be and stand in strength, virtue, and effect, except only, that no person or persons hereafter shall be presented, nominated, or commended to the said Bishop of Rome, otherwise called the Pope, or to the see of Rome, to or for the dignity or office of any archbishop or bishop within this realm, or in any other the king's dominions, nor shall send nor procure there for any manner of bulls, breeves, palls,"—and so on. That is, this very section enacts that the said act shall remain in full force, in all respects, except that there shall be no reference to the Pope, nor any payment of money or otherwise for bulls or any thing of that kind,—in short, that the court of Rome shall in no wise interfere in those proceedings. But, with that exception, (which I am content shall be enforced to the fullest extent), the said act of 23 Henry 8, is to remain in full force. Now I beg your lordships' attention to what is a little higher up in the page. In the 1st section, 23 Henry 8 is recited, which says: "And if any person, being named and presented, as is aforesaid, to any archbishoprick of this realm, making convenient suit, as is aforesaid, should happen to be letted, delayed, deferred, or otherwise disturbed from the said archbishoprick, for lack of palls, bulls, or other things to him requisite to be obtained at the see of Rome, that then every such person, so named and presented to be archbishop, might and should be consecrated and invested, after presentation made, as is aforesaid, by any other two bishops within this realm whom the king's highness, or any his heirs, or successors, kings of England, would appoint and assign for the same, according and after like manner as divers archbishops and bishops have been heretofore, in ancient time, by sundry the king's most noble progenitors, made, consecrated, and invested within this realm." Now what is the meaning of all this? Evidently, that those forms and processes, those ceremonies, rites, and proceedings, were to take place as heretofore within this realm; excepting always,—the exception being introduced into the 3rd section,—excepting always, with reference to any application to the Pope on the one side, or any interference of the Pope on the other. Now what is there here to alter anything, as to consecration or confirmation, or any other rite or ceremony or process in the church? Absolutely nothing, so far as this country is concerned. The act directs that, in all these things, you are to do as has heretofore been done by law and usage within this realm, except that you are to pay nothing to the Pope, that you are to make no application to the Pope, that you

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The same pe-
nalty appli-
cable to refusal
to confirm and
refusal to con-
secrate.

If confirmation
be a mere form,
so is consecra-
tion.

Form of conse-

are to receive no bulls from the Pope, but that you are to reject and exclude all interference on the part of the court of Rome.

But it is said (and herein consists the whole question at issue), that the statute allows the archbishop no alternative. Whilst we contend on the one hand, that this statute, when it requires the archbishop, after the party shall have been elected by the dean and chapter, and approved by the crown, and those proceedings duly notified to him, to proceed to confirm and consecrate the party, means that he is to confirm and consecrate according to the usages and the doctrines of the Christian church, and of the canon and common law of this realm,—namely, by means of and after due examination into the fitness of the person to be confirmed, and only upon approval;—whilst we contend, I say, that the statute, in requiring confirmation and consecration, means confirmation and consecration according to the usages and doctrines of the Christian church, and not otherwise, my learned opponents, on the other hand, say, that it renders all usages, all doctrines, all processes, and all ceremonies, mere matters of useless and impertinent form, and that it converts confirmation and consecration into mere ministerial acts, which the archbishop must perform, under peril of a *præmunire*. And, for that purpose, these words, in the last section of the act, are relied on, pointing out what is to be done: “Or else, if any archbishop or bishop within any the king’s dominions, after any such election, nomination, or presentation shall be signified unto them by the king’s letters patents, shall refuse, and do not confirm, invest, and consecrate, with all due circumstances as is aforesaid, every such person,”.....he shall incur *præmunire*. Now your lordships will observe that here is one and the same provision (not two provisions in the same terms, but one and the same provision, and one only), in respect both of confirmation and consecration. Because the archbishop is to incur a *præmunire*, if he refuse, and do not “confirm, invest, and consecrate,” within twenty days, the argument is, that therefore both confirmation and consecration must be performed within the twenty days; that, whatever may take place in the very process of the ceremony, either of confirmation, or of consecration, the confirmation and consecration must take place within twenty days as a ministerial act, and must be done as a ministerial act, or the archbishop incurs a *præmunire*.

Now, my lords, I will come in a very few moments to what the actual process is, in respect to confirmation, and what it has been now for nearly 300 years, without the slightest deviation or variation. But if the argument is good for anything with regard to confirmation, it is equally good and equally unassailable with regard to consecration. The archbishop,—however unfit he may find the bishop elect, in point of doctrine (and here we are upon doctrine alone),—must, says the *Attorney General*, nevertheless consecrate him: it is a ministerial act, and he incurs a *præmunire* if he fails to consecrate within twenty days. My lords, if that were so, if this act of parliament were imperative to make consecration a mere ministerial act, and to forbid, under the penalty of a *præmunire*, anything and everything but what is there enjoined,—if that were so, the first observation that arises to the mind upon it, is, that the form of consecration, which is to be found in the Book of Common

Prayer (which did not exist in the time of Henry 8, but which has been composed and adopted since), is a direct contravention of this act of parliament; because if this act of parliament means, You, the archbishop, when I have sent to you my letters patent notifying the election of a certain individual by the dean and chapter of A. B., are directed,—no matter what you may find, in the course of the proceeding, no matter what may appear to you as to his doctrine and character,—are directed, are bound to confirm and to consecrate him; and you must reject all forms and ceremonies which would interfere with the absolute and prompt performance of that ministerial act;—then, my lords, I say, this very form of consecration,—solemn and important as it is, and introduced into the Book of Common Prayer, now universally adopted throughout the whole of the British dominions,—is not merely a mockery (which is bad enough), but is a direct violation of the act of parliament. For I say, that it is impossible to read this act of parliament as an absolute command to the archbishop unconditionally to consecrate, and not to see that this whole ceremony of consecration is a direct invasion and violation of the act.

What do we find? I will go no further than to refer your lordships to a few questions which, in this form or ceremony of consecration, are put by the archbishop to the bishop elect. And I will refer you, in particular, to that one which more immediately bears upon this question; because it relates to the fitness of the party in point of doctrine. The archbishop says, "Are you persuaded that the holy Scriptures contain sufficiently all doctrine required of necessity for eternal salvation through faith in Jesus Christ? And are you determined, out of the same holy Scriptures, to instruct the people committed to your charge; and to teach or maintain nothing, as required of necessity to eternal salvation, but that which you shall be persuaded may be concluded and proved by the same?" The answer, to be given by the bishop elect, is, "I am so persuaded, and determined, by God's grace." Now, we are upon the very point of doctrine and of teaching, with reference to one who—be it ever so unfounded (as I trust hereafter it will prove to be)—lies under a deep and wide-spread suspicion of some unsoundness of doctrine and of teaching. We are here upon the very question, whether we are to regard as a mere form that which is the only part of the whole process, from his first recommendation to the crown by the minister, to the time of his being finally consecrated and perfected in all respects as a bishop of our church, in which that matter can be inquired into, or in any way ascertained, for the benefit of the church and the people, namely, whether he be of sound doctrine and teaching. We are upon the question, whether it is a mere form or not; and I turn to this part of the ceremony of consecration, as now required, and adopted, and unvaryingly acted upon by our church. I find there, that soundness of doctrine and teaching is an important and essential part of the character and qualification and fitness of a bishop. I find, that the question I have read is put; and I say again, the *Attorney General* is driven to contend, and, in order to prevail in this case, he must first satisfy your lordships, that this question also (because, if it be more than a mere form, an

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cration, in
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clusively upon

unsatisfactory answer to it would be a complete and absolute impediment to consecration),—that this question also is only a form, which may be struck out of the Book of Common Prayer, and be dismissed and rejected altogether. He must do so; and why? If he says that the archbishop is bound to perform the ceremony of confirmation, as a ministerial act, whatever the bishop elect may be, whether he be a Roman Catholic, or an infidel, or any thing else; then he must also maintain that the archbishop is equally bound to consecrate him. But if the archbishop, in such a case, be not bound to consecrate, he cannot be bound to confirm, under this act of parliament; the provision being the same as to both. Unless, therefore, my learned friend has made out that the archbishop is bound both to consecrate and to confirm, whatever may appear, he fails in his opposition to our case altogether. And if he do make it out, what is the consequence? Here is the whole ceremony of consecration, as pointed out in the Common Prayer, and as acted upon in every case, without exception, of the consecration of a bishop, in this kingdom, and throughout the queen's dominions: we find here that the above question is put to him; and now let me for one moment suppose that he were to answer that question,—“Are you persuaded that the holy Scriptures contain sufficiently all doctrine,” and so forth?—“I am not so persuaded: I cannot say with truth that I am;” what is the archbishop to do? I ask that question; and it is one which must be answered. It must be answered, in order that this case may be determined, upon the only principle upon which it can be determined, namely, the right and true construction of this act of parliament. Here is one and the same provision, in the 7th section, relating to confirmation and consecration,—the provision relied on by the *Attorney General*,—inflicting the penalties of *præmunire* if the archbishop does not confirm and consecrate within twenty days. My learned friends contend it means, that he must confirm, that he must consecrate, though on confirmation he may find the bishop is an infidel, though on consecration he may find that the bishop, as an honest man, cannot and dare not answer, in the affirmative, the questions upon doctrine which are put to him. My learned friend says, that still the archbishop must confirm, still he must consecrate. I defy those, who appear against me upon this occasion, to escape from that consequence. If the language of the act of parliament, in enjoining consecration by the archbishop, were different, even in form, from that which enjoins confirmation, it might be said, as my learned friends have said, that the meaning had reference rather to the well known form, than to the substantial nature of the ceremony of consecration, and to the questions which were thereon to be put to the bishop elect, and that therefore there was a distinction which rendered a different principle applicable to the case of confirmation. But the provision is one and the same.

There is the whole of the statute; and those are all the provisions upon which the *Attorney General* relies. The statute says substantially, that the right of nomination is conferred exclusively upon the crown, because the crown names to the dean and chapter, and the dean and chapter must elect the individual named, and no other.

So far, I admit, my learned friend is right. And upon the notification of that election by the dean and chapter, and the approbation of the crown to that election, and the signification of it to the archbishop,—then, says the *Attorney General*, the archbishop, according to the statute, must and shall within twenty days confirm and consecrate the bishop so named. My lords, if confirmation be a mere ministerial act; if confirmation is not to proceed according to the doctrine, according to the usages of the church of Christ, here in this country, and elsewhere; and if the archbishop is to be a mere automaton in the discharge of his sacred duties; if he is to confirm and consecrate, without inquiry, any one, be he who he may, whom under misrepresentation or bad advice the crown may have recommended for that purpose; or if the archbishop must do so, though, upon inquiry, he may find the person to be unfit upon the very grounds upon which, in the time of the Apostles, great and high ministers of the church have gone through this process and duty of consecration; if such be the case, then the ceremony is far worse than a mockery; it is an impiety, which it would be indecent to impute to our own legislators, or to any who have to carry our laws into effect.

Your lordships now have this point clearly before you. The act has all the coercive power which it was the intention of the arbitrary tyrant, who caused it to be passed, to confer upon the crown, I very fully admit. And if the crown appoint or nominate an unworthy person, or any number of unworthy persons in succession, the subject has no redress; there is no help. There is no means of obtaining a good, and worthy, and sufficient bishop, so long as the crown (if it be not irreverent to suppose it possible) will continue to appoint a succession of unworthy persons. But, consistently with that great and extensive power of the crown, may exist,—and, I trust your lordships will hold, does and shall continue to exist—the sacred and ancient power of the church, to inquire into, to examine, and determine upon the sufficiency of the person so appointed, before the archbishop shall go through the solemn forms and ceremonies of confirmation and consecration, and before the bishop shall acquire the power over the temporal and eternal interests of a great portion of the people, who may be committed to his charge.

My lords, it is said, however, that this is an attack upon the prerogative, and upon the principles of the Reformation. My lords, after the observations which I have already made, and the distinction, which I have endeavoured to press upon your lordships' attention, between the nomination, virtual or actual, of the crown, or of any other person or body of persons, and the purely ecclesiastical process and ceremony of confirmation and consecration, it is hardly necessary that I should detain your lordships any further upon this point. I do not deny the unqualified power and prerogative of the crown. And surely it is extensive enough, if we concede, as we must concede, that while there may be a subsequent examination into the fitness of the persons named, still the crown must nominate all who are to become bishops. We do not interfere with the power of the crown solely and exclusively to appoint the bishops of the church: we say the crown, and the crown only, shall appoint them;

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the crown by
the statute.

Impious
mockery of
confirmation
bestowed with-
out regard to
fitness.

Freedom of
inquiry at
confirmation
does not im-
pugn the
crown's prero-
gative of ap-
pointment.

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Necessity for a
check upon
improper ap-
pointments.

none other can be elected by the dean and chapter; none other can be confirmed or consecrated by the archbishop; none other can be obtained by the people of this kingdom. From the crown, and the crown only, must emanate the original appointment of all who are to become bishops and archbishops. But is there anything unreasonable—I might here adopt the arguments so ably urged in conclusion by my learned friend, Mr. *Badeley* (*e*)—is there anything unreasonable or unjust, anything irreverent or indecorous towards the crown, in holding, that, with the full and undisputed power of the crown, there yet must be the power and the duty in the church, and in the highest ministers in the church, to examine into and determine on fitness? I agree it is not to be supposed that the crown would appoint knowingly, or that any minister of the crown would knowingly recommend, an improper person. That I admit. But it is because no improper person ought to become a bishop, that this power is in the church, that some great minister of the church, who alone can be fit to enter into the inquiry as to doctrine, is so appointed by the laws of the church to examine into the qualification of the person who is named by the crown. Surely there is nothing unreasonable, there is nothing disrespectful to the crown, in submitting that just limitation to the exercise of its power. We are to remember that the whole argument, in this case, against the power and right of the church to inquire into the fitness of the person named by the crown, is founded upon the statute passed in the reign of Henry 8. My learned friends have said,—I think it was my learned friend, the *Solicitor General* (*f*),—Is it to be presumed that the crown will appoint, or that any prime minister will dare to recommend, one unfit in point of doctrine, or unfit on any other ground, to become a bishop? My lords, even in these times, the crown may be deceived, and the minister may be mistaken. But it must not be forgotten that this statute was made, not to govern the times only of a George 3, or a Queen Victoria, but the times of a James 2, who, if he could have done so under the sanction of law, would have filled the whole bench with Roman Catholic bishops. And what security are we to have, if, to the affliction of this nation, we should ever have a monarch upon the throne with the religious faith of James 2, if there be no power in the hands of the church to consider the fitness, in point of piety, doctrine, and religion itself, of the person named to be the bishop? What security have we, in such a case, that the whole bench of bishops will not be filled with Roman Catholics? This act of parliament was in force during the whole time of James 2; and this act of parliament would, upon the doctrine now contended for, have enabled King James 2 to recommend to the dean and chapter, and to compel the archbishop of his day to confirm and consecrate Roman Catholics, for every vacant bishoprick of the church, during his time; and unless the archbishop himself, in the performance of that sacred duty which we contend was imposed upon him, had the power to examine into the doctrine and the fitness of the person proposed, I know no way, but by a departure from, or abdication of, his high

(*e*) *Supra*, p. 396.

(*f*) *Supra*, p. 171.

functions, in which he could escape from the vain and wicked ceremony of placing upon the bench of bishops of this Protestant country a Roman Catholic thus recommended by the crown.

But, my lords, again looking to this act of parliament, surely there is some confusion in the argument which is urged, that, because it was the object of the act to vest in the crown absolute and exclusive power to name and appoint bishops, and to take that power away from the Pope, and from every and all other person and persons, therefore it intended to dispense with one of the most solemn and important religious processes and religious ceremonies known to the Christian Church. Why, my lords, suppose that the same kind of controversy had existed in this country, as to the nomination or presentation of individuals to livings, to benefices in general, which existed with respect to the appointment to bishopricks. Suppose that the crown, as it did with regard to bishopricks against deans and chapters and against Popes, had, in early and tyrannical times, insisted that the crown had the sole and exclusive power of presenting to all the benefices of this kingdom; that the people had opposed this claim; and that it had been (as this was) a subject of controversy during an entire reign, or longer. Suppose that the dispute had terminated (as in those times it probably would have terminated) in favour of the crown. And then suppose that an act of parliament had passed, like this act of 25 Henry 8, reciting the controversy, or false claim, as it would have been called, of the lay patrons made against the sacred rights of the crown; and that then there had followed an enactment, that thenceforth all persons presented to benefices by the crown should become the beneficed clerks of those benefices, and should be instituted and inducted without any reference to any lay patrons, or the rights of lay patrons. Suppose that there had been an act of parliament to that effect: that it would have taken from all lay patrons their patronage, their right of presentation, and would have exposed to whatever penalties were provided by the act, either the authorities of the church, or the lay patrons themselves, who might attempt to oppose the performance of the act, no one can dispute. That it would have vested in the crown the nomination and presentation to all the livings in the country of every clerk who was to be thus beneficed, as clearly and exclusively as, I admit, this act of Henry 8 has vested the original nomination of bishops, I fully allow. But will any one tell me, that, without express words, it would have put an end to the right, and not only to the right, but to the duty of the church to inquire into the fitness of the person before any such institution or induction? Because, according to the present law, at the time the man is presented, but before he can be instituted and inducted, he must be examined; he must be examined by the bishop; and it—I was about to use an expression which I will not resort to—but it is one of the great and necessary powers exercised by the bishops of this country, that no one can accept a benefice (and will you compare a bishoprick to a common benefice?) but upon the approbation of the bishop; no one can, even though he has already undergone an examination himself, be transferred from one benefice to another, without the approbation of the bishop. And will any

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Supposition of a legislative act vesting in the crown the patronage of all inferior benefices.

Such an act would not interfere with the episcopal examination of the crown's presentee.

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argument.

Stat. of Hen.
8 prescribes no
alteration in
form of confir-
mation or con-
secration.

The stat. di-
rected solely
against Papal
interference.

The court,
without an
express enact-
ment, ought
not to subvert
ancient mode
of confirmation.

Intent of stat.
25 Hen. 8,
c. 20, collected
from mode in
which it was
acted upon.

one say, that if this act of parliament, instead of being for putting an end to the controversy between the Pope and the crown, had been to determine a controversy between the crown and the subject, and had vested exclusively in the crown the patronage of all the benefices of the kingdom, it would have dispensed with or put an end to the right and duty of the church to examine into the fitness of the persons appointed under it? If such had been the intention, the act of parliament would have been expressed accordingly. And when your lordships look at this act of Henry 8, besides the circumstance that we find no words in it for altering the form and mode of either confirmation or consecration, besides that, on the contrary, we find in it that these proceedings are to take place—I think the words are all “the usual ceremonies,” and all the “usual observances” (always however excluding any reference to the Pope of Rome); besides all that, my lords, we find, that this act of parliament, in all its provisions, is directed solely to the exclusion of the Pope, and to the conferring of the original nomination of bishops exclusively upon the crown, and that it has nothing at all to do with the usual and accustomed Christian process of confirmation, or the usual and accustomed Christian ceremony of consecration. And, therefore, I apprehend that your lordships, looking to the Divine origin of this very proceeding; looking, my lords, to the long period of time during which it has invariably been adopted in all Christian countries, before any one could be made a bishop of the Christian church; looking also to the mode in which it has invariably been laid down by foreign jurists and by English jurists, that such is the form and process and mode in which bishops before the time of Henry 8, and bishops since the time of Henry 8, were to be confirmed, and afterwards consecrated, in this country; I apprehend, your lordships, looking at all this, would pause before you would, in favour of the prerogative of the crown, introduce into this act of parliament (for it would be introducing into this act of parliament) a provision altering, or worse than altering,—putting an end to, and destroying—this most sacred, solemn, and important ceremony and proceeding on the part of the church.

But one word more, my lords, upon the subject of the usage in this country. Certainly, after well considering the language of an act of parliament, there is no better way of ascertaining the true intent to be ascribed to the legislature who passed it, than by looking carefully to the circumstances of the time, and, above all, to the mode in which that act of parliament was acted upon, if acted upon without complaint or opposition at the period of time when the question, as to what was its meaning and object, must have been present to the minds of those who were to act upon it. Now, let us look at this act of parliament. It does not appear to have been acted upon at all, in the reign of Henry 8. It was suspended during the reign of Edward 6, and, by the prevalence of the Roman Catholic religion, during the reign of Mary also. But it was revived in the first year of the reign of Queen Elizabeth; and that is the important date to which we are to refer; when the act became the law of this kingdom, and when it was necessary that the people of this country, deeply interested in it as they were, should understand

how and in what way it was to be observed. Now, my lords, it is said, on the part of the crown, that the whole ceremony, the whole process, after the notification of the election to the archbishop, short of whatever may be (as they call it) the ministerial act of confirmation, is a useless form, which, if it has taken place, ought not to have taken place, because it is in contravention of the act of parliament. That is what they say. When then was the time when, if it were so, it is certain that those forms would have been dispensed with, and when the true object of the act of parliament would have prevailed and would have been in force? Why, on the first great occasion when the reformed religion again became the religion of this country, and when this, perhaps the most important act of parliament in the statute book, was revived by the Protestant monarch, queen Elizabeth. It would certainly be, on the first occasion, in her Protestant reign, when a bishop or archbishop should be appointed, and when it would be necessary to confirm him under and according to that statute, that a precedent would be laid down, and an authority established, which was to govern the church, and the high authorities of the church, and the people of this country, in all times to come. But what do we find then took place? Why, my lords, upon the election of Archbishop Parker, in the very year, I think, in which the statute was revived—when the attention of the whole country was directed to those questions relating to the supremacy of the Protestant sovereign of this realm, to the absolute exclusion of all interference on the part of the Pope, and to the thorough carrying into effect, to the last letter, of this important act of parliament, in order to the furtherance of the reformation and the establishment of the reformed religion,—we find, in this very first year of Queen Elizabeth's reign, in the case of Archbishop Parker, that every step and stage of the proceeding,—which, we say, is all more than matter of substance; which, we say, is matter of legal and religious duty and necessity; but which, they say, is an idle and delusive form,—that every step and stage of that proceeding took place as, we contend, it ought now to take place in the case before the court. Was the act of confirmation a ministerial act, which was to be performed within the twenty days, under the penalty, on those who had to perform it, of *præmunire*?

Dr. Addams. The election was not within twenty days.

Sir Fitzroy Kelly. I believe, my lords, I am right in saying, that, in the first place, the proceeding was not completed, that the confirmation did not take place, within twenty days: and why? Because we find, from the record which has been brought under your lordships' notice, I think by my learned friend, Dr. Addams, from *Bramhall's* book (g), that so minute, so precise, was the whole proceeding, in conformity with the canons of the church, in conformity with the usages of this and all other Christian countries, that, though the statute was observed in the final election and confirmation of the individual nominated by the queen, and in the total and absolute exclusion of all interference on the part of the Pope, yet all the usual steps of the proceeding took place,—the

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Especially in
the instance of
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Parker.

In Parker's
case the con-
firmation was
not completed
within twenty
days after the
election.

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Inquiry at con-
firmation in-
variably main-
tained as
legally requi-
site, to the
present day.

Unimpugned
by Queen Eli-
zabeth.

Mountague's
case.

citation of opposers, the examination of witnesses upon their oaths as to the qualification and fitness of the bishop elect, and time and deliberation in the investigation,—exactly as we contend that it ought to take place at the present day.

My lords, am I now to meet an argument, or an assertion, that all this is the law of foreign canonists, and that it never was the law of this kingdom? In my turn, I ask, how can this usage be disproved? There is no proof whatever in support of the statement of my opponents to the contrary, which never was the law. Show us, they say, the law-book, touching the subject, in which you find that what you allege is the law, that it is the usage. Show me, I say, a single instance, from the time of the 1st of Elizabeth, when this statute became the law of this country, down to this very proceeding on the part of Dr. Hampden,—or take the case of Dr. Hampden himself,—in which any one part or portion of this form has ever been omitted. There is none. My lords, at the time when, of all others,—upon the first proceeding under an act of this important character—men's attention was directed to the subject; when all minds were bent upon these very points; when the queen, if not a tyrant like her father, was at least as jealous of her prerogative as any one of her royal predecessors upon the throne of this realm; and when she had to determine how her own imperious will was to be obeyed; did she, even at such a time, pretend that the sacred offices of the church were to be dispensed with and abolished? Did she ever suggest that there should be no examination of fitness, that there should be no citation of opposers, or that, if there were, the opposers should not be heard? On the contrary (and it must have been under the royal eye that it was done, as well as upon the advice of statesmen and of the dignitaries of the church), every step took place in the proceeding, exactly as we are now humbly urging before your lordships that it ought to have taken place upon the present occasion. And, my lords, from that time to this, the usage has been the same. I dwell not, my lords, upon particular instances. I will not allude further to the case of Bishop Mountague. I admit that it is not a direct or a very high authority, because it was not discussed in any court of justice: and I give no further weight to it than this, that the form was observed, that the whole process was gone through, and that when an opposer appeared, he was not told that it was all an idle form, and that he had no right to appear; but it was judicially determined—aye, and properly determined, as it must have been in the present day, if a similar question had arisen,—that, in the form in which the opposer propounded his objections, he could not be heard.

My lords, the usage has been so from that time to the present. We find that from the first year of the reign of Elizabeth, when this proceeding took place upon the confirmation of Archbishop Parker, to this day, no bishop or archbishop has ever been confirmed or consecrated, without these very acts being done, of inquiry and examination into the fitness of the person proposed, of the citation of opposers, and of the final declaration, in a judicial form, by the archbishop, that the party's fitness and other qualifications having been proved, the confirmation should take place. And we always

find that the confirmation, and afterwards the consecration itself, according to the forms and ceremonies of the church, have likewise been performed by the archbishop.

Now, my lords, with regard to the question, whether the citation of opposers, or, in other words, an inquiry into the qualification of a bishop elect, is, under the law of this country, a part, not merely of the power and the right, but of the duty of the archbishop, all the authorities are uniform; and all histories,—the history of this country, and the history of all other Christian countries,—are likewise uniform, to show that such is the law, and that such has been the usage. Again, if the statute be urged against it, I have submitted to your lordships that the statute itself contains no provision against it; and that, as far as we find any express provisions in the statute touching any of these processes or ceremonies of the church, those processes or ceremonies are preserved unaltered, instead of being dispensed with or set aside. And then we find that, under this statute, and upon every proceeding that has taken place since it was revived in the first year of the reign of Queen Elizabeth, such has been the constant and unvarying process upon confirmation; and that, afterwards, since the form of consecration was established and introduced into the Book of Common Prayer, such has been the proceeding and ceremony of consecration. And this, therefore, if it stood alone, would suffice for disposing of the whole question, and for calling upon your lordships to direct, that the judicial duty of carrying on the process, according to the law of the church of this country, should be performed.

My lords, such being the state of the argument, in the way in which we present it to your lordships, it is only by difficulties in point of form, or by ingenious suggestions as to difficulties,—with which I must be pardoned for humbly observing, that even your lordships, with your profound learning, may find it somewhat hard to deal,—it is only by suggestions of difficulties of that kind, that even a shadow of an argument can be raised against your interference. And, accordingly, my learned opponents say this, What is the nature of this court? Has it the power to enter into the examination? Has it the power to go through the judicial forms and proceedings necessary to the attainment and the administering of justice? Why, my lords, I certainly heard with some surprise that it had fallen from my learned friend, Dr. Bayford, who argued this case upon the other side,—or at least that a doubt had been suggested by him, whether there was the power in the court to examine witnesses (*h*); and that a difficulty had been raised as to the bishop himself not being a party. Why, my lords, this is the court ecclesiastical of the archbishop. It is true that, in ordinary cases, the proceedings cannot be said to take place *in foro contentioso*. It is true that in ordinary cases there would be no opposition of party to party, so as to call for the exercise of any contentious jurisdiction. But, my lords, can it be contended that any court, which is held as a court having the power and ordinarily exercising the power of examining witnesses, and of examining those witnesses

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All authorities, legal and historical, uniformly in favour of the usage.

The stat. of Henry 8 contains no provision against it.

Difficulties suggested by the counsel on the other side;

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As to the
bishop elect
not being a
party to the
inquiry.

Citation to him.

Archbp. Par-
ker's case.

Any further
judicial autho-
rity, possessed
by the arch-
bishop, neces-
sary for doing
justice, would
have been
called in aid.

upon oath, and upon that examination of determining upon perhaps the most solemn and important question that can be raised in any court in any kingdom;—can it be contended that that court has not some power inherent in itself of citing witnesses, if witnesses are necessary to the elucidation of the truth?

My lords, first, with regard to the bishop elect being made a party, I state it to be clear, by analogy to the proceedings of every other ecclesiastical court, and particularly all the courts of the archbishop, that if these parties had been admitted by their proctor to be heard, and had exhibited the articles which they were prepared to exhibit, a citation must immediately have issued to the bishop, if he were interested, calling upon him to meet and to answer these articles. That is the proceeding in all other courts spiritual; and I cannot but conceive that it would be the proceeding here. It is true that in point of form the party who appears, as it were, for the bishop, or rather on behalf of the bishop, is the proctor for the dean and chapter. It is the dean and chapter who exhibit the petition, setting forth the election, with the approbation of the crown, the fitness of the bishop elect, and all those other matters that ought to be proved. And it may be that they are considered as the representatives of the bishop, and that it would be they who come forward and exhibit articles, in which they allege fitness, and under which they are bound to prove fitness. It may be that it is they, and not the bishop elect himself, who are the parties that would have to meet the allegations of the opposers, if opposers were to appear. My lords, I freely admit that; I am not sufficiently familiar with the proceedings of these courts to say what would be the form of proceeding under the circumstances. But I find in Archbishop *Parker's case*, there was a citation for opposers. I think there was some delay in the proceeding, to see if opposers would come in to appear, and that even none appearing (that being the first proceeding under the act of parliament), witnesses were examined upon oath, and deposed upon oath, at considerable length, and with minute particulars, to the qualification of the bishop elect (*i*). My lords, I cannot doubt that if, upon the citation, opposers had come in, that would have been met, either by calling upon the bishop elect, or by calling upon the dean and chapter who did exhibit this petition alleging his fitness, (which is a matter of practice of which I do not pretend to know any thing); that, in some way or other, and in some form, they would have done justice; and that, according to the usual course of practice of courts spiritual, either the bishop, or the dean and chapter on behalf of the bishop, would have had an opportunity of coming forward, to meet the allegations on oath; and that those opposers would have made their allegation on oath, which actually to this day are recorded, as a part of the proceeding.

My lords, if it were necessary, though I do not conceive that it is, to call in aid any other judicial authority possessed by the archbishop, for the purpose of doing justice, I conceive that it would have been done: that if it had been necessary for the archbishop, sitting in any other character, to exercise any other judicial power (and in many

courts, I need not say, it is held, that under the archbishop, and under his authority, there is power to exercise a contentious jurisdiction, to cite witnesses, and to determine upon adverse testimony) —I say, if such a power were necessary, I conceive that it is inherent in the Archbishop of Canterbury, metropolitan of all England, for the purpose of enabling him to do justice in any court spiritual, in which he has the duty imposed upon him of administering justice.

My lords, I do not forget what fell from a very high authority, the late Lord Chancellor, Lord Lyndhurst, upon a case by no means unlike that which is now before your lordships; upon a question, whether all the powers which are inherent in any judge who may exercise powers, in various courts, in various ways, and for various purposes, under the constitution, may be exercised by him and may be applied by him in the administration of justice for the discharging of any duty which the statute or common law may impose upon him. I remember a case in which Lord Brougham, who was then Lord Chancellor, succeeding to Lord Lyndhurst, committed a person of the name of Dicas, the attorney in a proceeding in bankruptcy, under an order in bankruptcy. Dicas brought an action against Lord Brougham (*j*). I was, with the present Mr. Baron Platt and the late Sir William Follett, counsel for the plaintiff; and, not one of your lordships present, but a learned judge of this court, Mr. Justice Wightman, was counsel for the defendant. Upon that occasion, the question arose whether the action was maintainable; and it was urged by the learned counsel for the defendant, that the action was not maintainable; because, although it was true, as alleged on the part of the plaintiff, that the statute in bankruptcy, under which alone jurisdiction in that case had been conferred upon the Lord Chancellor, gave him no power to commit at all, or to make the order of commitment which he had made in that case, yet (it was answered by the learned counsel, now a learned judge,) that all the powers that were inherent in the Lord Chancellor, might be exercised under the statute which gave him jurisdiction in bankruptcy, and that it was for that very purpose, in all probability, that the legislature had conferred upon him the power to act judicially at all. And it was so held by Lord Lyndhurst, and the court of Exchequer affirmed that rule. His lordship said, that he should presume that it was the object of the law, in intrusting the Lord High Chancellor with that power, that the Lord High Chancellor, (I well remember his expression) might bring to bear upon the exercise of that jurisdiction all the authorities and powers which he held as Lord High Chancellor under the law; and that therefore he had undoubtedly the power of commitment, although it was not expressly conferred by the statute; that he had all the powers incidental to this high judicial office, in every proceeding in bankruptcy, and that, under the limited statutes in bankruptcy, he might exercise them.

My lords, so I say here. The Lord Archbishop of Canterbury has very high and extensive judicial powers. He has the power of compelling the attendance of witnesses. He has the power of

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Exercise, by the Chancellor, of his powers, as such, when sitting in Bankruptcy.

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Judicial powers of the Archbp. of Canterbury competent for the full administration of justice in the present case.

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*Sir Fitzroy
Kelly's
argument.*

administering oaths, and hearing and determining upon contentious testimony. He has various other powers necessary to the due administration of justice. And I apprehend that, by virtue of the high office which he fills judicially, as well as ecclesiastically, if it become necessary, in this very court, (which he holds, for convenience, through the vicar general, for him) to exercise the power of citing and summoning witnesses, compelling the attendance of witnesses, or any other judicial power which he, as Lord Archbishop of Canterbury, and metropolitan of all England possesses, he might bring those powers to bear (to use the expression of Lord Lyndhurst) upon the cause before him, in order effectually to administer justice. And, my lords, to suppose,—where we find, from jurists and canonists and writers of other countries and of this country, that all these proceedings took place, and have invariably taken place, at all times, and in all countries, and that they include the preceding steps taken in relation to the opposers and the opposed there alluded to,—to suppose that in the court of the Archbishop of Canterbury, the highest ecclesiastical judge that we have in this realm, there are not all the powers which are incidental and necessary to the doing of justice, is really to suppose that the law, which in that respect is as ancient as any portion of the common law of this realm, is miserably defective and insufficient.

My lords, if there were any doubt upon this subject, it is a doubt which ought to be settled upon a return to a mandamus. I most freely admit myself incompetent, at any time, but especially at the present moment, to deal fully with what is the extent of jurisdiction of a high ecclesiastical judge in a court spiritual. I cannot say what it is, or what it is not; but I do venture to take for granted, that, if we find under the canons of the church, if we find in our own text books of law, if we find in the language of the judges of the common law courts, that a certain process and various forms of proceeding take place in a certain court of the Archbishop of Canterbury, in which he judicially administers justice, terminating in a regular sentence or decree in a perfectly legal and judicial form,—I cannot, my lords, but take it for granted, that he has a power inherent in himself by the law of this country to do all which it is necessary to do for the administration of justice.

*Limitation as
to time, in
Church Disci-
pline Act,
precludes in-
quiry, under
that act, in
present case.*

Again, my lords, it has been said, what power has the archbishop to proceed in a case of this nature? The parties, if they have anything to complain of, must proceed under the Church Discipline act (*h*). Why, my lords, the very provision, on which reliance for another purpose has been placed, in the Church Discipline act, is an answer to that objection. No proceedings under the Church Discipline act can prevail, after the lapse of two years from the offence or wrong committed: there is a statute of limitations; and two years will put an end to proceedings under that act. Then suppose any bishop elect had erred in point of doctrine,—ever so grievously and badly erred,—but more than two years ago: though he might retain the same opinions; though he might carry those opinions with him to the bench of bishops; though there might be a danger, or even a certainty, of his acting upon those erroneous opinions in

(*h*) 3 & 4 Vict. c. 86. Vide *supra*, pp. 123, 154, 228, 230.

every judicial act which, as bishop, he might do, in relation to deacons and priests; although that were the case, if he had given utterance to those opinions, but if there were no overt act of that kind within two years, the Church Discipline act would not prevail; and such a person might be confirmed and consecrated. For though the archbishop himself, who was about to confirm and consecrate him, might be perfectly aware of his error of doctrine, he might nevertheless be compelled, under the penalties of a *præmunire*, to confirm and consecrate him. My lords, I admit that that again is a difficulty which has been thrown out; but it is a difficulty of no weight whatever.

Again, it is said, that if you come forward and object before the Archbishop of Canterbury, or his vicar general, that the bishop elect has been guilty of some offence which is known to the common law, you are to procure his conviction first; because how is the archbishop, without the means of empannelling a jury, to try a subject of the realm for a crime against the common law or the statute law of the country? Why, my lords, my answer is, that what the archbishop would do under such circumstances, is entirely for his own judgment and his own conscience. I apprehend, he would take the best means that the law affords him to satisfy himself whether the bishop elect was or was not so far justly suspected of the offence in question, as to make it his duty to abstain from the solemn act of confirmation and promotion to the office of bishop. And am I to be told that that could not be done, because he has no power to empanel a jury, or because there had been no conviction, supposing that there had been no conviction? My lords, there are thousands of analogous proceedings in the courts of justice. The highest courts, as well as the inferior courts, have the duty imposed upon them of considering the guilt or innocence of offences known to the law, of persons who are before them, where it is impossible for them to put in operation the usual constitutional means of trying the parties accused. I need only put the case, with which your lordships are peculiarly familiar, of an attorney of this court who is charged with any offence, which is brought before you upon a motion to strike him off the roll. Whether your lordships think proper to direct that he should be convicted of that offence, if it be an offence punishable by law, before you will exercise your summary jurisdiction, and strike him off the roll; or whether you will look into the facts, and judge for yourselves, as to whether he is a fit person to remain upon the roll of attorneys,—is a matter entirely dependant upon your own practice and your own mode of exercising your jurisdiction. I believe that a case very lately occurred before your lordships (*l*),—I was prevented from arguing it, but I rather believe it was before this court,—in which there was a motion to strike an attorney off the roll,—I think an attorney of the name of King,—where he had been convicted of an offence; but afterwards it happened that the judgment of conviction, the judgment of guilty of that offence, was reversed upon a writ of error; so that, in point of law, he had been guilty of no offence. I rather think the case came

Regina v. The Archbishop of Canterbury.

Sir Fitzroy Kelly's argument.

Answer to the objection that a conviction at common law is first requisite.

In other courts, the guilt or innocence of persons often considered, without a formal trial.

Application to strike an attorney off the roll.

Re King.

Regina v. The
Archbishop of
Canterbury.

Sir Fitzroy
Kelly's
argument.

In the case of a
charge against
a bishop elect,
the archbishop
judges how it
shall be inves-
tigated.

before your lordships, at a subsequent period, as to whether that attorney, who had, I think, before been struck off the roll, should be restored. Whether it came originally upon the motion that he should be struck off the roll, I am unable to say. But your lordships then considered the question, whether it could be said that he had been legally convicted, inasmuch as the judgment of conviction had been reversed upon the writ of error. Your lordships held that enough had come out and been satisfactorily proved before you, to show that he was an unfit person, guilty or not guilty of that offence according to law, to practise as an attorney upon the rolls of this court; and he is at this moment off the rolls of the court, under your lordships' judgment. So, my lords, I should say here, I cannot tell whether the archbishop (that is, I cannot answer for his judgment), if any offence like perjury or felony were imputed to an individual in this situation, would require conviction, or whether he would himself enter into the investigation of the charge: that is a matter of practice in that court; it is a matter for his judgment, and for his judgment alone. But certainly, my lords, that has nothing at all to do with the question whether, where the person is in the situation of a bishop elect, and about to be promoted to the highest ministry in the church, there shall be an ecclesiastical examination (some examination, by persons competent from their station in the church themselves,) as to the soundness of his doctrine and teaching, before he shall be put into a situation in which any error in doctrine and teaching is fatal not only to himself but to thousands of others who are committed to his charge.

My lords, some objections have also been urged, in this case, to this particular remedy by writ of mandamus. My lords, the cases have been so very fully brought under your lordships' attention, that even if I were able, I should be very unwilling to occupy your lordships' time much further upon this subject. (I see, by the way, my lords, that Mr. King, the attorney, had been struck off the roll in the first instance; and although the conviction was set aside ultimately, such was your lordships' judgment, that he should remain off the rolls of this court.)

Mandamus a
proper remedy,
notwithstanding
the objection urged that
this is a matter
of spiritual
jurisdiction.

Rex v. St.
Peter's, Thet-
ford.

Now, my lords, it has been said in this case, that no mandamus will lie, because this is a matter purely of spiritual jurisdiction. But, my lords, let us see what is the meaning of the proposition. It is very vague, conveniently vague for those who have propounded it. We can only collect the meaning and object of it from the authorities which are cited in support of it. And what was the first and principal case referred to? Why, that a mandamus will not lie out of this court, to compel the making of a church-rate (*m*): and why? Because the proper remedy was a proceeding for obstruction of the church-rate, in the ecclesiastical court. And, my lords, I entirely admit the justice of that principle. Your lordships will not usurp the functions of the court spiritual, by using the writ of mandamus as a means of administering justice in spiritual matters, which are exclusively within the jurisdiction of the ecclesiastical court. It would be exactly the same case as if your lordships were applied to

(*m*) The King v. St. Peter's, Thetford. Vide *supra*, pp. 150, 157.

for a mandamus to compel the restitution of conjugal rights. The answer would be this: if you sue in the court spiritual, and, you having a right to be heard, they refuse to hear you, you may come to us, and we will command them to do justice; but to come and call upon us, sitting here, to give you a mandamus for the restitution of conjugal rights, is to ask this court to apply a mandamus to a purpose wholly of a spiritual nature, and to something exclusively within the jurisdiction of a spiritual court. Therefore, my lords, there is really nothing in that objection. The ground upon which we submit to your lordships that a writ of mandamus is the correct and proper remedy in this case, is, that this court will, by that high prerogative writ, cause justice to be administered, wherever an inferior court, having jurisdiction, refuses the queen's subjects to exercise that jurisdiction upon a proper occasion. It is a high prerogative writ to enforce the performance of a judicial duty cast upon an inferior court. And when my learned friend talks of a mandamus to the Vice Chancellor of England to admit parties to a bill in Chancery (*n*), in the first place, that is a superior court, and no mandamus would lie. But even if that were not so, it then would be an interference with the jurisdiction of the court of Chancery, a court co-ordinate with this high court itself. But, my lords, we do say, that the rule, without exception, is this; that where any cause is brought, or sought to be brought, before any inferior court, in which it is the duty of that inferior court either to proceed to hear certain parties who have an interest in the matter in question, or to proceed to adjudicate, or to perform any other judicial act, to discharge any other judicial duty, if the inferior court fails to perform that duty, this court will interfere by way of mandamus and compel its performance. I quite agree that your lordships will not interfere, by way of mandamus, with the practice of any inferior court; and if this court of the vicar general had held, that, as a matter of practice and usage in that court, the particular parties claiming to be heard on this occasion were not the right parties, and so were not entitled to be heard, that, according to the usage and practice of that court; such was the law, then it would be the law of that court, and it would be the law of England that this court could not interfere. It is a matter of appeal, if an appeal would lie; but this court could not interfere, to correct the error of an inferior court, in a matter either of law or of practice. But, my lords, this is a case in which the inferior court has refused to hear the parties, or to admit them to be heard at all; and if your lordships will not interfere by way of mandamus to compel that court to hear, there is no remedy, and the writ of mandamus would fail in one of its most efficient uses and objects. My lords, this is exactly like the only case to which I will refer at this period of the argument, because it would not be unbecoming in me to occupy much more of your lordships' time. I mean the case to which I referred, in moving for this rule, *The King v. The Justices of Kent* (*o*); in which the very doctrine for which I am now contending was laid down in a few emphatic words by Lord *Ellenborough*, and with which I close this part of the case. Lord

Regina v. The Archbishop of Canterbury.

Sir Fitzroy Kelly's argument.

True ground of interference by mandamus.

Rex v. Justices of Kent.

(*n*) *Supra*, p. 149.

(*o*) *Supra*, p. 117.

Regina v. The
Archbishop of
Canterbury.

Sir Fitzroy
Kelly's
argument.

Ellenborough there said, "that if the justices had rejected the application, in the exercise of the discretion vested in them by the legislature, this court would not interfere; but if they had rejected it on the ground now stated, that they had no power to grant it, the court would interfere so far as to set the jurisdiction of the magistrates in motion, by directing them to hear and determine upon the application." And the rule was granted, which was afterwards made absolute. Now, my lords, that is exactly the case here. If the vicar general's court had heard these parties, and had determined, in the exercise of its judicial functions, even that, by the law of that court, by the usage of that court, they were not the proper parties to be heard, I should have doubted whether this court could have interfered by way of mandamus, because that would be to correct an error in judgment of an inferior court, and not to compel it to hear and determine. But, my lords, we are told that, by reason of this act of parliament (the statute of Henry 8), they have no power to hear the parties at all. That is not an exercise of their judicial functions. It is, if we are right in our argument, a misconstruction of the act of parliament; and it entitles the parties aggrieved by it to come before your lordships and claim this writ of mandamus.

Now, my lords, one word, and one word only, upon the subject of the parties. And, my lords, that bears upon two distinct points of this case; first, the interest of those parties, and, secondly, the importance of the case altogether, an importance too high to enable your lordships, consistently with the rules of this court, finally to determine it one way or the other, upon this motion for a mandamus. My lords, who are these parties, and what is the direct and positive and undoubted nature of the objection which they make, and the consequences of the persons being rejected, and, consequently, of the objections never being heard or determined? My lords, out of the three parties two are clergymen within the diocese of Hereford. One is a clergyman elsewhere, but who may hereafter go within that diocese. Now, my lords, to advert to this one point alone, let us see the situation in which it may be that one of these very individuals now before the court, praying your lordships to command that they may be heard, may actually stand. My lords, first let me suppose for a moment that one of these gentlemen within the diocese of Hereford were about to be presented to another and, I will suppose, a better and richer living within that diocese. He knows that, being presented, he cannot be instituted and inducted to this benefice, which he expects, and to which I may assume he is entitled, without undergoing an examination before the bishop upon his doctrine and teaching, and obtaining the bishop's sanction to his institution and induction. He may know that, upon some point,—and I will not presume to suggest what that point may be,—but he may know, or he may strongly suspect and believe, that the bishop elect entertains a particular opinion upon that point of doctrine and teaching, wholly at variance with the Thirty-nine Articles, and the true and real doctrine of the church of England. Now, my lords, he is in this situation. Here is a citation to all opposers, to come in and oppose the confirmation of the bishop elect. They are even to be deemed contumacious if they fail to come in, having just grounds of oppo-

Interest of the
parties op-
posing.

sition. He has this plain solid substantial ground, in point of reason, and of justice, and, I think, of law. I, he says, am about to be appointed to a benefice within the diocese; and if the opinions of the bishop elect upon this point of doctrine are right, mine are wrong; but if mine are right, his are wrong: the two cannot be right; and if he examine me, and if he act conscientiously upon the opinion he entertains upon this point of doctrine, he cannot sanction my becoming a beneficed clergyman within his diocese; I must be rejected, and I must lose my benefice. What am I to do? Why, I am cited to appear to offer my grounds of opposition before a spiritual judge, the very head of the church of England, the ecclesiastical head of the church of England, who is the best judge between us two, which of us is right, and which is wrong, upon this point of doctrine. I come forward to state that I believe the bishop elect entertains this opinion. I freely admit that I entertain a contrary opinion to that; and do you, my lord archbishop, and your vicar general, determine between us whose opinions are in conformity with the church of England. If you find that my opinion is right, that I am of sound doctrine and teaching, and that the bishop elect is wrong, that he is not of sound doctrine and teaching, then I do oppose his confirmation; and I pray you, my lord archbishop, and I pray my sovereign the queen, not to force upon me a bishop who entertains these opinions, and who, if he act upon these opinions, must exclude me, and every other orthodox clergyman whom he has to examine for any benefice within his diocese, and that, because we entertain right and religious opinions touching the doctrine of the church of England. Why, my lords, can it be said that there is here no interest? I do not advert to the other circumstances already urged,—that upon the purity and the rightness, the strict rightness, of the bishop elect's doctrines depends the admission of every individual hereafter to become a minister of the church within his diocese; that upon it depends the ordaining of every deacon and priest within the diocese; that upon it again depends the admission and institution to their livings of all the clergymen within his diocese. All these matters depend entirely upon the perfect rectitude and rightness of his doctrine according to his church of England. And those are the points which—though, from the time of the Apostles downwards, they have been inquired into, examined into, and determined upon, by some high ecclesiastical authority, in every Christian country throughout the world—are now to be renounced and rejected, as mere matters of frivolous and absurd form, and to be thoroughly and totally disregarded!

My lords, I have done with the case, lamenting indeed to have occupied so much of your lordships' time. I conclude, my lords, by most earnestly and humbly beseeching your lordships to consider, and I am sure you will consider, the high and unspeakable importance of the points and questions involved in this inquiry. It has been said, it has been complained of, I think by my learned friend the *Solicitor General* (*p*), that we, by this proceeding tend,—I think he did not say seek, but tend—to disturb the peace of the church.

Regina v. The
Archbishop of
Canterbury.

Sir Fitzroy
Kelly's
argument.

Peace of the
church as likely
to be disturbed
by the appoint-

Regina v. The
Archbishop of
Canterbury.

Sir Fitzroy
Kelly's
argument.

ment of a sus-
pected person,
as by opposition
to his confirma-
tion.

My lords, the peace of the church may be disturbed as well by the appointment of one to be among its highest ministers, who labours under deep and wide spread suspicion of unsoundness of doctrine and teaching, as by any honest and decorous opposition to the confirmation of that person to the high office of bishop. Justice, the people, and after times will determine, for it is not for your lordships to determine, which of these contending parties, if they are contending parties, is responsible, for disturbing the peace of the church and of the people of this country.

My lords, I conclude by once more expressing my earnest hope and confidence, that, in dealing with this question,—unless, contrary to all that we have thought and believed upon these important subjects, your lordships' minds are clear and free from all approach to doubt upon all the important points involved in this great inquiry,—your lordships will do, as you yourselves have always done, as your predecessors have done before you,—put this great and solemn question into that course of inquiry by which alone (perhaps I may say with deference and respect) the wishes and the objects of the people of this country, upon a point involving all that is dear and sacred to them, can be duly and justly satisfied.

The *Attorney General* rose to reply.

Lord DENMAN. Mr. *Attorney General*, we are not prepared to hear you in reply, unless you produce some precedent.

The *Attorney*
General claims
a right to reply.

The *Attorney General*. My lords, I apprehend that I am entitled, and I will state to your lordships shortly the grounds upon which, I apprehend, I am entitled to reply. My lords, this rule directly infringes upon the prerogative of the crown; and, to have been perfect in its form, it should have been served upon the officers of the crown, to appear and defend the rights of the crown. I, however, waive that matter of form, appearing here, as I stated to your lordships in the first instance, instructed by the government, though with the concurrence of the archbishop, to defend the act and the proceeding of the archbishop, and to assert the prerogative, if this be, as I shall contend before your lordships it is, an attack upon the prerogative of the crown. And as I appear here to defend that prerogative, I apprehend it is an undoubted right of the crown's officer, in this the crown's court, to have the last word upon every subject affecting the interests of the crown.

Lord DENMAN. The crown is, in this case, prosecutor. I do not know of any precedent exactly like this case.

The *Attorney General*. My lords, there is no precedent unquestionably; and, I think, for the best of all reasons, that there has never hitherto, that I am aware of, been called in aid the name of the crown, to strike a blow at the prerogative of the crown. In the Court of Exchequer, your lordships know, that whenever any matter, even of so inferior a nature as a matter of revenue, of which the court has the administration, is affected, it is conceded as a matter of right to the *Attorney General*, in every case, be it on motion or otherwise, to reply. My lords, the only case that I know of in which this matter has at all arisen in this court, was in the case

Right of reply
conceded to
the *Attorney*
General in the
Exchequer, in
revenue cases.

of *Rowe v. Brenton* (q), I think, where a similar application was made. That was applicable to a subject connected with mines in Cornwall. It was a trial at bar; and the late Sir *Charles Wetherell*, then conducting the case as attorney general, demanded his general right of reply; and the court rejected that claim, in that case, upon this ground, that the crown was not there a prominent and interested party. But the attorney general of that day did not then certify to the court, as I now certify in my official capacity, that the crown is interested in this investigation; and upon that bare certificate, in this court, the very court of the crown, the court defers to that statement.

*Regina v. The
Archbishop of
Canterbury.*

*Rowe v.
Brenton.*

Lord DENMAN. Are you certain that you are correct in saying, that the attorney general did not certify to the court that the crown was interested, and thereby obtain the trial at bar? I do not know, however, whether I ought to have interposed; because I do not know that the other party objects.

Sir *Fitzroy Kelly*. Yes, my lord. I was about to say, that I had informed my learned friend before he rose, that I should object.

The *Attorney General*. My lords, I must apologize for having fallen into error. I was about to illustrate what I was stating, by reference to the practice, in the case of *Rowe v. Brenton*. The attorney general there stated to the court,—and the bare statement your lordships know is sufficient,—that the crown was interested in that case, because the statute (r) does not apply to the crown, and there can be no trial at *nisi prius* if the crown's interest is affected. I have not looked into that case: but my learned friend Mr. *Hill* has told me the circumstances of it.

Attorney Gen-
eral's oral
statement of
the crown's
interest.

Mr. Justice COLERIDGE. I believe, in point of practice, it is only an oral statement.

The *Attorney General*. Only an oral statement: it is an oral certificate. I have interposed my authority, since I have unworthily filled the office which I now hold, on more than one occasion, in the court of Exchequer, to stop a writ of *nisi prius*, simply upon my statement, as the statement of the attorney general in court. Consequently the court takes notice of the interests of the crown; and the writ does not issue, because the crown is not bound by that act. My lords, my learned friend reminds me that this is distinctly stated in the case of *Rowe v. Brenton*, which is reported in *Manning and Ryland*, though I cannot put my hand upon it now.

Sir *Fitzroy Kelly*. Here is the report of *Manning and Ryland*.

Lord DENMAN. Was not there a case in the Exchequer, where Mr. Baron *Parke* laid down the law upon the subject, which we afterwards adopted?

The *Attorney General*. What time does your lordship allude to?

Lord DENMAN. About a year ago, I think.

The *Attorney General*. That was a case of changing the venue. Your lordship means the case of *The Attorney General v. Lord Churchill* (s). The question there was, the right of the *Attorney General* to choose the venue in a local action; and though it had

Att. Gen. v.
Ld. Churchill.

(q) 3 Man. & Ryl. 133, 304.

(r) 14 Edw. 3, c. 16; "Before what

persons *Nisi Prius* may be granted."

(s) 8 Mees. & W. 171.

Regina v. The
Archbishop of
Canterbury.

Doe d. Legh
v. Roe.

been said that, in a revenue process, it could be so, the court, upon looking at the old books, were of opinion that, upon a local action, the crown had no such prerogative; but they admitted the prerogative upon a personal action.

Mr. Justice ERLE. I remember, Mr. *Attorney*, a case (*t*), where an action of ejectment had been tried, and the lessor of the plaintiff had recovered a verdict; and the attorney general of that day, Sir *Thomas Wilde*, came into the court of Exchequer, and informed the court that the land in question was land which the crown claimed, being land adjoining to Hurst Castle, in the county of Hants. And, upon that certificate of the attorney general *ore tenus*, the court at once stayed execution, and gave all the privileges which related to the property of the crown, merely upon the certificate of the attorney general.

The *Attorney General*. My lord, I can myself state two cases which are now pending in the court of Exchequer, upon that simple question; the case of *Hallett v. Vigne*, and, I think, *Hallett v. some other party*.

Sir *Fitzroy Kelly*. I shall not dispute, my lords, that any statement *ore tenus* by the *Attorney General* is convincing, as to the fact. Therefore I will not call for any further proof from my learned friend.

Lord DENMAN. We think we had better hear you, Sir *Fitzroy Kelly*. I confess I have some little doubt about this right of replying at all; because I think that, upon these occasions, it is in the discretion of the court, according to the pressure of the argument, and their view of the necessity of the case. It must be subject, in some degree, to those considerations.

Sir Fitzroy
Kelly, against
the Attorney
General's right
to reply.
Where no pre-
cedent, court
will not extend
crown's prero-
gative.

Sir *Fitzroy Kelly*. My lords, I oppose this claim of the *Attorney General*, upon this single but plain principle, that this court will not increase and extend the prerogative of the crown, which it would do in giving effect to a claim of this nature, where there is no precedent for that claim being allowed. I apprehend, my lords, that with regard to the right of reply, or any other exercise, in courts of justice, of the prerogative of the crown against the subject, if a precedent can be found, the court must act upon it: if there be no precedent, the court will not give effect to the claim. My lords, that was the ground upon which Lord *Tenterden* and the court of queen's bench acted, in the case of *Rowe v. Brenton*; and I perfectly remember at the time that there was a very lengthened discussion; but I think, my lords, the whole essence of the decision of the court is to be found in what fell from Lord *Tenterden*, after the matter had been argued. Lord *Tenterden* says (I am citing, my lords, from 3 *Manning and Ryland*, p. 306), "No instance being shown in which the *Attorney General* has, in a case like the present, had the reply, we think it safe not to extend the rule, but to allow the cause to take its ordinary course." And, my lords, I conceive that that is the invariable practice of this and every other court, in questions upon the prerogative, between the crown and the subject. Now, my lords, that is particularly the case with regard to this mere

Rowe v.
Brenton.

motion for a mandamus. Your lordships will observe that it has been laid down, that a mandamus gives no right, not even a right of possession, but puts a man in a position to enable him to assert his right which, in some cases, he could not do without it. My lords, this therefore is no question touching the prerogative of the crown, even if, upon the ultimate determination of the inferior court (if this court should be pleased to grant the mandamus), something is determined which may be supposed to restrict the prerogative of the crown. The effect of granting this motion, nay, the effect even of a peremptory mandamus, could not in anywise so affect the prerogative of the crown; it merely would be, that certain parties are to be heard in a certain suit in an inferior court; and therefore there is no right, there is no prerogative of the crown, which is or can be involved in this particular question, and in this form in which it now comes before your lordships. But, my lords, even if there were, it is not extended to the case of the crown maintaining and taking up the cause of a subject, as here the crown takes up the case of the Archbishop of Canterbury. My lords, where the crown is directly interested in point of property, nay, even in point of revenue, your lordships will find it has been held, that, where there is no direct precedent in point, no court will extend the prerogative of the crown against the subject. My lords, in the case of *Lord Dunglas v. The Officers of State*, coming from Scotland to the House of Lords, in 9 *Clark and Finnelly*, p. 200, the crown claimed the right of reply; and Lord Campbell, one of the lords, says: "I do not remember any case in which the *Attorney General* replied on the reply of the counsel for the plaintiffs or pursuers." Mr. Pemberton says: "The most diligent search has been made in the Journals of the House for a precedent, without success." "The *Attorney General* admitted that they did not find any precedent; at the same time he submitted that he had a right to a general reply." Lord Cottenham, the present Lord Chancellor, says: "The question having been raised by the *Attorney General*, must be decided." "The lords after having conferred together on the point, informed the *Attorney General* that it was not the usage of this House for the *Attorney General* to have a general reply on the part of the crown." And it was disallowed.

The Attorney General. The same was decided in *O'Connell's case* (u), but upon the practice of the House of Lords.

Sir Fitzroy Kelly. It is rather against myself that I make the admission; but I cannot say that it was so decided in *O'Connell's case*. I opposed the claim of the then *Attorney General*; but *Sir William Follett* waived it; and therefore no decision was called for or pronounced.

Mr. Hill. My learned friend will recollect that it was stated (I was in the case) by their lordships to us at the bar, that it had been settled by their lordships that in no case could there be a general reply in the House of Lords.

Sir Fitzroy Kelly. Then, my lords, in another case, of *Drake v. The Attorney General*, in the House of Lords, which is in 10 *Clark and Finnelly*, p. 257, "In a case where a private party had presented

Regina v. The Archbishop of Canterbury.

Sir Fitzroy Kelly, against the Attorney General's right to reply.

On a motion for a mandamus, the crown's prerogative cannot come into question.

The privilege contended for does not extend to the case of the crown taking up the cause of a subject.

Lord Dunglas v. The Officers of State.

O'Connell and Others v. The Queen.

Drake v. Atty. Gen.

Regina v. The
Archbishop of
Canterbury.

Sir Fitzroy
Kelly against
the Attorney
General's right
to reply.

an appeal, and the *Attorney General*, on behalf of the crown, had presented a cross appeal against the same decree, the counsel for the private party were heard continuously on both appeal and cross appeal, and then the counsel for the crown were heard on both, and the senior counsel for the private party was heard in a final reply; and this course was adopted, although the case was one in which, being a matter of revenue, the crown was directly concerned."

Now, my lords, I am told there is a great number of cases relating in some point to the prerogative of the crown, as to a reply, one way or the other. I do not trouble your lordships any more, because there is no case in which, upon a motion for a mandamus, nor, so far as I know,—but I shall be corrected, if I am wrong, by the *Attorney General*,—upon a motion at all—

The *Attorney General*. There is, in the Exchequer—

Practice in the
Exchequer.

Sir Fitzroy Kelly. The Exchequer! But the Exchequer is a prerogative court; and I know of no claim with regard to the prerogative of the crown, which is not immediately admitted, and almost without, or in spite of, argument, in the court of Exchequer. My lords, I hope that your lordships will rather—if you are to follow, and not set the example—follow the example of the highest tribunal in the land (the House of Lords), and hold that the *Attorney General* is not entitled to reply.

Lord DENMAN. If there is any case in point in the court of Exchequer, we shall be disposed to regard it with the greatest respect.

Sir Fitzroy Kelly. I am sure, my lord, I hope that nothing which has fallen from me would at all tend to the conclusion, that I entertain otherwise than the greatest respect for the decisions of the court of Exchequer. But I say nevertheless, with all the respect which we must feel for the decisions of that court, that there can be no doubt that, from entertaining questions of revenue, the crown being constantly a party there, the tendency of that court is to allow the claim of the crown. My lords, the reason why I urge upon your lordships the great distinction between this court and the court of Exchequer, is, that in the court of Exchequer, the *Attorney General* undoubtedly possesses and constantly exercises many privileges which are not allowed to him in any other court in the kingdom. The reason probably arises from the nature of the business carried on in that court. Among other privileges in the court of Exchequer, the *Attorney General* may, at any moment, pending another cause, or motion for a new trial, and as soon as the counsel sits down, or I believe while the counsel is in the middle of an argument, rise and claim the exclusive attention of the court to any matter of revenue or prerogative on the part of the crown.

The *Attorney General*. And here.

Sir Fitzroy Kelly. It has not, that I am aware of, been done here. But there are these distinctions between the latitude allowed in the court of Exchequer, and in other courts.

My lords, I will not detain your lordships, after so lengthened an argument in this case, upon this, which perhaps, after all, is not a very important point, except as it regards future cases. I conclude, therefore, by submitting, that unless some clearly applicable pre-

cedent in point can be called before your lordships, your lordships will not, upon a question of this kind, arising indirectly and incidentally between the crown and the subject, deny the subject that right which he possesses in all other cases, and grant any extension to the prerogative of the crown. And I submit to your lordships, that there is no precedent in point, and that therefore, as in the case of *Rowe v. Brenton*, this claim must be disallowed. My lords, my own experience does not furnish me with any cases bearing upon this point. I do not know whether any of the officers of the court have a recollection of cases. But your lordships, no doubt, if it becomes necessary, will put the question in a course of inquiry.

Lord DENMAN. I must confess I am very jealous about this idea of a vested right in counsel to make a reply. It is really not of the consequence that is supposed. When we hear any counsel, I take it to be a right in the court to say, after the counsel has concluded, whether the case ought to be argued upon the other side. The rule of practice has reference to the public convenience, and must in some degree depend on our view of the state of the question. The course of proceeding before a jury may admit of a different consideration; but we have a control over all our proceedings in this court, and we have always a right to prescribe the course which is most convenient for the occasion.

Mr. Hill. Your lordships exercised that right in the *habeas corpus* case from Canada (*v.*).

Lord DENMAN (after conferring with the other judges). It appears to us that it would be convenient, upon this occasion, to hear the *Attorney General*.

The *Attorney General* in reply. My lords, thanking your lordships for that indulgence which you have afforded me, your lordships will not deem it disrespectful, when I state, that I appear here, by my prerogative right, to claim the indulgence which your lordships have so afforded me. My lords, it would not become me,—although I confess that I am struck by the absence of all argument, on behalf of my learned friends, as to many of the objections which have been urged, collateral to the great point in this case—it would not become me, claiming a reply upon the ground of a prerogative, and exercising that privilege under your lordships' kind permission, to make any observation at all upon those collateral and subordinate questions. I ought, in the exercise of what I deem to be my right, to confine myself simply to that great question, which arises upon the construction of the statute of Henry; and certainly I shall not abuse that right, by going into any of the subordinate points, which seem to me to remain unanswered, after this long discussion; but I shall content myself simply with that observation upon them.

My lords, I quite agree with my learned friends, in holding this to be a case of the utmost importance. It is important as affecting the interest of the crown: it is important as affecting the interests

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Sir Fitzroy
Kelly
against the
Attorney
General's
right to reply.

The court has
a right to pre-
scribe the most
convenient
course.

The Attorney
General's
reply.

Importance of
the present
case.

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of the gentleman whose qualifications are sought to be impeached. But it is far more important to the public at large, affecting—as in my judgment it does affect, in the event of your lordships entertaining this motion, or making the rule absolute,—the peace of the church, the security of that establishment, and the well being hereafter of all persons interested in the maintenance of our true religion.

My lords, I am at a loss to understand what there is, in this case, which called from my learned friend, Mr. *Badeley*, any appeal, to any religious feeling which should actuate your lordships (v). The importance of the case undoubtedly will require a full consideration of it; but the decision of it will be arrived at with the same careful attention, and with no more, than you would dispose of any case of equal importance. I quite agree likewise with my learned friend, Sir *Fitzroy Kelly*, that it is a case deserving of the deepest consideration; but I dissent from his notion, that unless your lordships see clearly and plainly, beyond the possibility of doubt, your way to a decision in favour of the view which I take, you are to yield to any supposed notion of practice which may prevail here or elsewhere, and take a step, the infallible consequence of which will be to unsettle men's minds for a lengthened period, and which is inapplicable in its practice to a case of this description, where his grace, the archbishop, must take upon himself in his consecration to decide the law; while your lordships, by entertaining a doubt, may put the people's minds in an unsettled state, and ultimately present the matter, involved in great difficulty, for the determination of his grace the archbishop. I apprehend, therefore, that unless your lordships see, in a matter of this novel description, your way clearly and plainly, beyond all doubt, to the maintenance of this mandamus, a different rule will prevail in this case from what ordinarily is supposed to prevail in the common cases adverted to by my learned friend; and that you will not stay the ordinary execution of the law, or what is admitted on all hands to have been the concurrent practice from the earliest periods, unless you are satisfied by the arguments of my learned friends that, beyond the possibility of doubt, you will not miscarry in granting the rule; knowing from necessity that the mere suggestion of a doubt for a moment must be attended with such fearful consequences.

My lords, my learned friend Mr. *Badeley*, and my learned friend Sir *Fitzroy Kelly*, in the same view, have contended that this motion infringes not upon the prerogative of the crown. And my learned friend Mr. *Badeley* has drawn a refined distinction between the placing and the making of bishops. In illustration of that argument, he has said: Can it be pretended, if a bishop, upon examination, finds a priest unfit for induction into a government living, that that is an interference with the prerogative of the crown (w)? Far from it. The presentation to livings, founded upon patronage, is no prerogative of the crown. So early as the reign of Edward 3, it is admitted to have proceeded upon a totally distinct footing; for your

Consequence of
granting the
mandamus will
be to unsettle
men's minds.

The mandamus
ought not to be
granted, unless
the case be
perfectly free
from doubt.

Distinction
contended for,
between the
placing and the
making of
bishops, over-
refined.

Crown's prero-
gative in re-
spect of bishop-
ricks, stands on
a different
footing from
crown's patron-
age in respect

(v) *Supra*, p. 400.

(w) *Supra*, p. 396.

lordships know, that by 25 Edward 3, stat. 3, it is put upon the ground of simple unprerogative patronage, and that a *quare impedit* is given, even to try the question of the right of the party, the presentee under the patronage of the crown. There therefore exists between those two cases no analogy whatever. The one is founded upon patronage, exercised upon endowments, the gift of others; the other proceeds upon prerogative, from the head of the state, and in respect of endowments founded by the crown itself, and given by the crown, in right of its prerogative. I think therefore, my lords, that with this single observation I have disposed of that apparent analogy adverted to by my learned friend.

I come now, therefore, to what is, in my view, the correct construction of the statute; and I confess, having attended, as I have done, with great anxiety to the arguments of my learned friends, from the commencement to the end of them, and having listened as far as I could with every desire to understand their arguments, that so far as those arguments have gone, to my mind at least, they have only raised difficulties against themselves; and the more you refer to the ancient canonical institutions upon this subject, the more certain is the construction of the statute, for which we now contend. But, my lords, before I proceed to make a remark or two upon the statute, I want to advert to an observation with which my learned friend Sir *Fitzroy Kelly* most forcibly concluded (*x*). When referring to the status of the objectors upon this occasion, he pointed out a great difficulty which would occur, in the event of any one of those gentlemen receiving a presentation to a benefice within the diocese of Hereford. He says, that what those gentlemen may consider to be, and what may be true doctrine, may, by possibility, in the opinion of the bishop elect, be false doctrine, and that they may be deprived of a temporal interest, and that therefore they have a valid objection to state before the court. I wish to take that argument at a much higher point. I want to consider the difficulties which must suggest themselves to your lordships' minds, if you were to listen to this application, and allow the doctrine of the bishop to be decided by my learned friend Dr. *Burnaby*, the vicar general. And I want to present to your lordships the difficulty which must occur, and which can only be remedied by the exercise of the prerogative for which I now confidently contend. I assume that the court makes the rule absolute: the question is to be determined by the archbishop, or the vicar general. It is not too much to say, that what has happened, may happen again, and that shades and differences of faith may prevail from time to time; and we may have, in the province of York, that held to be sound which is questioned in Canterbury, or the reverse. What is the result of that? Who is to determine the soundness of the doctrine? Is it the archbishop, without appeal? We have then prevailing, with no responsibility, the same doctrine, if you please, but under different forms, in the two provinces of this kingdom; and a third, (by admission) uncontrolled, in Ireland, where the responsible minister of the crown is the

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of crown livings.

25 Edw. 3, stat. 3; "*Statutum pro Clero.*"

Status of the objectors.

Difficulties great and unavoidable, if any inquiry into soundness of doctrine be permitted.

(*x*) *Supra*, p. 426.

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reply.

A virtually lay
tribunal, the
Privy Council,
the ultimate
and irrespon-
sible tribunal
for deciding
questions of
doctrine.

The difficulties
in question can
only be solved
by the exercise
of an uncon-
trollable prero-
gative.

Object of the
stat. of Hen. 8
was to get rid
of all such
questions as
the present.

Under the old
canonical elec-
tions only, in-
quiry was
permitted, at
confirmation.

sole judge of the fitness of the bishop,—a third doctrine there current. Can my learned friends say, that that is cured by an appeal to another court? Granted: for if this view be correct, and the archbishop be sitting in his court of audience, or whatever it may be, there was an appeal originally to the delegates, and now, by transference, to the privy council (y). Who then determine, irresponsibly and without check, the question of soundness of doctrine, on appeal from his Grace of York or of Canterbury? Laymen, whose qualification is, that they have the honour to be summoned to her majesty's privy council. A bishop or more may be there, as my learned friend says: they may be summoned; but they may be overruled by the decision of the laymen. And thus, laymen, without appeal, are to be judges of the soundness of doctrine, which, my learned friend says, is of such essence and importance, that the church alone can judge of it! By the constitution of that court, one bishop and three laymen must be present; and that court so constituted must, in the view taken by my learned friend, be the court to decide upon the question of doctrine; which will not relieve my learned friend from the difficulty of a diverse doctrine prevailing in York, in Canterbury, and in Ireland, as of necessity it may. How then is this difficulty to be got rid of? In the simplest, in the plainest, and, as it seems to me, (remembering the precision with which statutes were framed in those days) in the most conclusive way, pointed out by that statute; by making the temporal head of the church the person responsible for the election of the officers of the church, and resting in the prerogative, to be exercised by the responsible minister of the crown, the choice of the party who is to be deemed fit and who is to fill the office. And, my lords, when your lordships see the difficulties which may and must prevail, and when, with them in view, your lordships turn to the words of the statute, I confess that, so far from that statute leaving any doubt upon the minds of those who have a knowledge of what was the then prevailing canon law, not of this country, but prevailing generally, and what it was the object of the legislature to prevent, it seems to me that nobody could have penned an act better calculated to get rid of this present question, than those who penned the statute upon which this present question principally arises. Now what says that statute? My learned friend, the *Solicitor General*, adverted to a passage which for a moment had escaped my attention, and which is conclusive upon the matter. The history of the law is this. I admit, that, according to the old canonists and jurists, where there was a canonical election (and, by the way, I would remind your lordships that since the passing of the act of parliament the word "canonical" is omitted), certain persons only were qualified to elect; and only certain persons, defined by the canonists, could be elected. There was no mode of ascertaining the validity of the election; no head, but the Pope (through usurpation), to put his authoritative sanction upon the election, by reason of the qualifications of the electors or of the elected. And

(y) By 2 & 3 Wm. 4, c. 92; afterwards amended by stats. 3 & 4 Wm. 4, c. 41; 6 & 7 Vict. c. 38; and 7 & 8 Vict. c. 69.

therefore, when the matter was strictly conducted as a canonical election, the party who confirmed might inquire into the election, like the process of *quo warranto* in a temporal inquiry; and he might inquire into the fitness of the elected; there were no other means presented by the law. But in passing, it is an observation which cannot escape your lordships, and cannot fail to have great weight, that, in the four days which have been consumed in the argument in this inquiry, no one of my learned friends has satisfied your lordships, what are, or are not, the binding jurists, of whom this court can take notice. At all events, neither of those, I know, who are referred to by the statute (z), (I allude now to the Constitutions of *Othobon* and of *Peckham*) make mention of the confirmation of bishops: there is not a word about the confirmation of bishops. And, remembering that those canons only are law, which have been sanctioned by statute, or have been made the law of the land by the custom of the country, we, to say the least of it, are now much in the dark, to know upon what constitution, or upon what doctrine, we are to rely.

But I proceed with the statute. It seems that this being, by admission, the canonical mode of election and confirmation, there had been a contest with Henry 3 which was unsuccessful, and which was yielded by John; and in the reign of Henry 8, in the 23rd year, the Statute of Annates passed, which said this: We find that the Pope is encroaching upon the jurisdiction of the crown: in effect the Pope is making pretences for obtaining large donations and subsidies from bishops, upon their election. The statute of the 23rd of Henry 8 does not interpose imperatively, but gives to the crown an authority to negotiate with the Pope, if the Pope will yield to those negotiations. The statute of 25 Henry 8 says: The Pope has not yielded; we will therefore recite the act, and we will pass it as a binding law. And what says the 3rd section? "Forasmuch as in the said act"—that is, the Statute of Annates,—“it is not plainly and certainly expressed, in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated within this realm,” it enacts “that no person hereafter shall be presented, nominated, or commended to the bishop of Rome, otherwise called the Pope, or to the see of Rome, to or for the dignity or office of any archbishop or bishop within this realm, or in any other the king's dominions, nor shall send nor procure there for any manner of bulls,” &c., but “that the said act and everything therein contained shall be and stand in strength, virtue, and effect.” It re-enacts that statute. Then what is it? As my learned friend suggested, it is this: “If any person, being named and presented as aforesaid”—that is, named and presented by the crown—“to any archbishoprick of this realm, making convenient suit”—that is, accepting the office, and requiring to be confirmed and consecrated—“shall happen to be letted, deferred, delayed, or otherwise disturbed from the same archbishoprick, for lack of pall, bulls, or other to him requisite, to be obtained in the court of Rome in that behalf, that

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No certainty as to who are the canonists of binding authority.

Constitutions of *Othobon* and *Peckham*.

Stat. 25 Hen. 8, c. 20.

Previous attempts at negotiation and compromise with the Pope, by means of stat. 23 Hen. 8, c. 20.

Which failing, by stat. 25 Hen. 8, c. 20, the ancient and uncontrolled power of the crown was, in effect, restored.

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then every such person named and presented to be archbishop, may and shall be consecrated and invested, after presentation made, as is aforesaid, by any other two bishops within this realm, whom the king's highness, or any of his heirs or successors, kings of England for the time being, will assign and appoint for the same, according and in like manner as divers other archbishops and bishops have been heretofore, in ancient time, by sundry the king's most noble progenitors, made, consecrated, and invested" (*a*). What is the meaning of that? If you apply to the archbishop, and the archbishop requires suit to the Pope, and will not invest, you may apply to two bishops. And what is then and there to be done? As was done of old, before the Pope interfered with the nomination: no election, no confirmation. It is to be done as the kings formerly did it; there is not a word about confirmation; it is, as they "made, consecrated, and invested" them. If therefore it happens that the archbishop delays, and sues to the Pope for bulls to do the act, you may apply and make suit to others; and then those bishops shall proceed, as of old was the practice, before the encroachment of the Pope; and there shall be no confirmation, because the bishops are not to confirm. There is to be investiture and consecration, as bishops were made of old time by the king's progenitors. How was that done? By the ring and staff. Therefore, so far from that statute fortifying my learned friends' view, the case is this: if the act of 23 Henry 8 had been a positive enactment, the practice which was adopted in *Cranmer's case* (*b*), would not have prevailed. But it was in the 24th year of Henry 8 (in Cranmer's time) that the king had an opportunity afforded to him of negotiating with the Pope; and it was in the following year that his parliament enabled him to pass an act upon the basis of this act of the 23rd, which was then but conditional, and is now recited and confirmed. It says that this practice shall be absolute. If the archbishop sues to the Pope, the consecration and investiture shall go on, as of old, when the king made the bishop by delivering the ring and the staff; and there was no confirmation whatever required.

Exception in
the statute of
Elizabeth rela-
tive to *præmu-
nire*, accounted
for.

My lords, my learned friend Mr. *Badeley*, not followed I think by my learned friend Sir *Fitzroy Kelly*, has raised an objection to a clause of the act, the 7th section, as applicable to *præmunire* (*c*). A very short reference to the history of the matter will explain that observation. Your lordships know that after the passing of this statute, and during the reign of Henry 8, upon the dissolution of monasteries, a large portion of ecclesiastical property was vested in the hands of laymen. It would have been too strong a measure for queen Mary to have wrested that property from the holders; and accordingly your lordships will find, in 1 & 2 Philip & Mary, c. 8, s. 40, *præmunire* threatened against those who should disturb that property. In repealing the statute of Philip & Mary, in the reign of Elizabeth, and in words renewing the statute of Henry 8, it naturally occurred to the framers of the act (*d*), "Yes; but here is a

(*a*) 23 Hen. 8, c. 20, s. 2; *supra*, p. 33, n.

(*b*) Vide *supra*, pp. 36, 130, 167.

(*c*) *Supra*, p. 357.

(*d*) 1 Eliz. c. 1. See sect. 32.

stringent provision, for quieting the property of the laity which has been acquired from the church." And therefore they say that nothing in the act of Philip & Mary that affects *præmunire*, shall be repealed. My learned friend says, it cannot be so. You find in the 7th section of the statute of Henry 8 the *præmunire* which overrides the whole act; and that is not to be repealed. The explanation which I have given is satisfactory to remove the objection so urged by my learned friend Mr. *Badeley*, and it is too much to say (e), that my Lord *Bacon*, in enumerating what are the subjects of *præmunire*, mentions, as he does, the dean and chapter, omitting the archbishop; being clearly wrong in either view; for either he has made a mistake in omitting the archbishop, or he is wrong in including the dean and chapter; because if *præmunire* is repealed for one, it is repealed for both; and if it exists for one, it exists for both. At all events, if it is necessary to urge any authority, seeing that the concurrent view of all writers upon the same matter has been against the new construction put upon this act by my learned friend Dr. *Addams* and my learned friend Mr. *Badeley*, Lord *Bacon* is an authority against them; because he says, that the dean and chapter have this choice, either to obey the direction of the crown, or to subject themselves to *præmunire*.

My lords, that being so, and it further appearing clearly that this *præmunire* clause remains part of the act, let us see what is the fair meaning of the act of parliament. I am not going now to argue the act, except to meet the objections which have been made on the other side. My learned friends do not deny that the election is, in the language of the reigns of Edward 6, of queen Mary, and of queen Elizabeth, and, in the more classical and ornamental language of my learned friend the *Solicitor General*, a shadow and a sham; because the dean and chapter must elect the person mentioned in the letters missive: they have no alternative. But my learned friend, Sir *Fitzroy Kelly*, is shocked that this confirmation, which begins with the solemnity of prayer, should be thrown away, and should, by the exercise of the prerogative, be utterly void. Now let us see what is done in the election. The election takes place in the midst of the service of the day; and the canonists state that the *Te Deum* is sung, in thanks for the assistance given to them in the election of the party named. The whole of it preserves the form of election. In the language of *Gibson* (f), there is "*seemingly*" an election in the "*footsteps*" of the old election. Surely, if there is anything wrong in having matters so solemn violated in the proceedings of the election, it is no great stress of argument to say, that the same observation is applicable to every confirmation.

Now, my lords, my learned friend says, is it not dreadful that you may have a heretic, a person known to be unfit? Is it not equally so with respect to election? Suppose the dean and chapter of Hereford knew, to use the language of my learned friend Mr. *Peacock* (g), that the man had committed some heinous crime; sup-

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Lord Bacon.

If confirmation, without inquiry, be a solemn mockery, election is not less so.

(e) *Supra*, p. 358.

(f) *Ubi supra*, p. 142.

(g) *Supra*, p. 322.

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General's
reply.

And consecra-
tion also.

pose we take the case of perjury, to their knowledge committed: what can they do? They must elect, upon my learned friends' view, in order to give an opportunity of inquiry: because, if they do not, there is no inquiry, and the man is at once consecrated: they have no choice. Again, I pass over the confirmation for a moment, assuming that the confirmation has been regular, that parties have been called, that nobody has appeared, that no objection is made; and I suppose that, between the confirmation and the consecration, it comes to the archbishop's knowledge that the party has committed a heinous offence: what is to be done? The act of parliament has pointed out the mode in which the archbishop is bound to consecrate. The act of parliament, passed in the reign of Edward 6 (*h*), before the repeal of the statute of Henry 8, has said what questions and answers are to be given. The greater the offender, the more certain he is to answer the questions which are put. What is to happen? The archbishop knows that the man has committed perjury; and the man adds to that offence, by further perjuring himself, in answer to the inquiries. The act of parliament says, that that form of consecration, and that only, shall be observed. The archbishop has no right to put another question. And the statute of Edward, and the statute of Elizabeth (*i*), and all of them say, that the consecration, performed according to the form in the Prayer Book, shall be good to all intents and purposes. I put the case that the archbishop knows that the man is guilty of a heinous offence. He knows of course that, the more guilty, the less scrupulous will he be in answering those inquiries. What is he to do? He must obey the act of parliament: he is bound to do it. It is plain; because the act says (and the archbishop has no right to deviate from the form prescribed), that those shall be the questions, and those only. In the ordination of priests, a different mode is adopted: opposers are called. Not so, in the case of a bishop: those questions, and those only, can be put; and, being answered, the consecration must proceed. My learned friend says, what if they are not answered? Why then there is no let or impediment by the archbishop: it is part of the duty of the bishop to answer the questions; because that was the legal meaning of consecration, in the reign of Elizabeth, when the act was revived and re-enacted. He answers those questions; if he answers them, the consecration must go on. I am putting a case.—Is that a greater hardship? It is a greater blow to the church, it is a greater difficulty, than being deprived of the means of inquiring at confirmation. I am taking the strongest case.

"The Royalty
of the Crown."

Francis Mason,
an authority
unfavourable to
the opposers.

My lords, these matters have not been overlooked; these questions have not escaped attention. In the very work, in the very pamphlet before your lordships (*j*), page 17, Francis Mason comments upon

(*h*) 5 & 6 Edw. 6, c. 1; "An Act for the Uniformity of Service and Administration of the Sacraments throughout the Realm."

(*i*) 8 Eliz. c. 1; "An Act declaring the making and consecrating of the

Archbishops and Bishops of this Realm, to be good, lawful, and perfect."

(*j*) "The Royalty of the Crown in Episcopal Promotions," quoted by Dr. Addams; *supra*, p. 277, et seq.

that question. Philodoxus says, "But if the King, deceiv'd by undeserved recommendations, should happen to propose to the Clergy a person unlearned, or of ill morals, or otherwise manifestly unworthy of that function, what's to be done then?" says Philodoxus. My learned friend did not read this; but I read it now, as answering the difficulty which is presented to the court. Orthodoxus says this: "Our Kings are wont to proceed in these cases maturely and cautiously; I mean, with the utmost care and prudence: and hence it comes to pass that the Church of England is at this time in such a flourishing condition." Then proceeds the questioner: "Since they are but men, they are liable to humane weakness: and, therefore, what is to be done, if such a case should happen?" Then comes the answer: "If the electors"—that is before the election—"could make sufficient proof of such crimes or incapacities, I think, it were becoming them, to represent the same to the King with all due humility, modesty, and duty; humbly beseeching his Majesty, out of his known clemency, to take care of the interest of the widowed Church. And our Princes are so famous for their piety and condescension, that, I doubt not but his Majesty would graciously answer their pious petition, and nominate another unexceptionable person, agreeable to all their wishes. Thus a mutual affection would be kept up between the Bishop and his Church." Now that very case has occurred to Francis Mason, in his justification for the course taken by Elizabeth in the nomination of her bishops. Philodoxus, who is supposed to be a Romish priest, objects to it, and says, the crown is not infallible; the crown may commit an error. The answer is given in the first instance. He pursues that inquiry, and asks, What is to be done? Does Orthodoxus say, "Aye; but there are intervening steps where the matter can be inquired into, where the soundness of the doctrine of the party nominated can be tested?" No: he says that the electors can represent the case to the archbishop who is bound to confirm, can represent it to the archbishop who is bound to consecrate, can humbly represent it to her Majesty, "with all due humility, modesty, and duty; humbly beseeching her Majesty" to nominate somebody else; and then the respective duties of each party will be perfectly discharged. The Queen, who may be deceived, may, in the exercise of her prerogative, if she is satisfied, or if her advisers, after full consideration, are satisfied, that the person so appointed is unfit,—the Queen may then nominate a fresh person. But to say, that the archbishop may inquire into the matter, that he is to be the judge of doctrine, that he is to decide whether the party shall be nominated or not, is, in truth, to make him the judge, and to give him a veto upon the exercise of the crown's prerogative. The whole of these writers thus show, (and I apprehend that others, if they were searched, would show the same), that, although there is an attempt by ancient forms to connect the link which all are so interested to preserve between the ancient and the reformed church, yet, when they are brought to the dividing point, it can be explained clearly, that, though there is no right to interfere with the prerogative of the crown, a representation to the crown may preserve a mutual

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reply.

When the form
of consecration
was first regu-
larly instituted
by law, there
was no confirm-
ation.

Parker's case
no authority.

Presbytery of
Auchterarder
v. E. of Kin-
noul.

confidence between the bishop and the church, the act being effected by the crown, which is the spiritual head of the church in these matters.

My lords, I only wish to point out, in addition, what I think is a mistake of my learned friend, Sir *Fitzroy Kelly*, in respect of the service of consecration. He says, if the archbishop must confirm, he must consecrate (*k*): the same words are applicable to each, in the act of parliament. Now each must be according to the law as it then stood; and at the time that this act was revived or re-enacted by the statute of Elizabeth, the very form of consecration was a subsisting definition of the consecration itself; and at that time, it is important to observe, when that form of consecration was prescribed by the statute of Edward 6, there was no confirmation at all, because it had been abolished by the provision of a statute (*l*) which was afterwards repealed: therefore there was no form of confirmation then,—none whatever.

My lords, I think it would be wrong in me to avail myself of your lordships' kindness at greater length. I have only one other topic to mention to your lordships for your consideration, in this further remark, that although I took the liberty of pressing upon my learned friends, in the commencement of my address to your lordships, the necessity of finding a single instance in which a similar objection had been heard, they have failed in that attempt. They have referred to *Parker's case*, which is no authority. It was not a proceeding under the act. It is doubtful if there was a letter missive. It is certain that the letters patent were not addressed to the archbishop (*m*), in the terms of the act; because he was a Roman catholic. The course of election did not take place within the time prescribed by the act; the confirmation was not within the time; and the consecration was not. There were no opposers,—none whatever. And because there was a doubt, whether it was an election under the act, they did not take the course, which is now taken, to produce the queen's patent as proof of the facts, but proved them by parol, there being no objector. My learned friend can bring that case only; and that really is the precedent for the course which he now proposes to take! Your lordships know that this matter was discussed in the case of *The Presbytery of Auchterarder v. Lord Kinnoul*. Formerly benefices in Scotland, like bishopricks in England, were donative. I am merely going to read the language of Lord *Brougham*,—a single word,—because his lordship points out very clearly, what is the nature of the choice. If your lordships think I ought not to do so, I will abstain, and will merely give your lordships the reference. It is page 693 of the 6th volume of *Clarke and Finnelly's Reports*.

My lords, I think that perhaps I ought not further to trouble your lordships upon the matter. I have only to conclude by praying you, as early as is consistent with your lordships' view of this im-

(*k*) *Supra*, p. 410.

(*m*) Heath, Archbishop of York.

(*l*) 1 Edw. 6, c. 2. Vide *supra*, p. 42, n.

Vide *supra*, p. 237, n. (*h*).

portant question, to intimate your lordships' opinion upon it. I do assure you, that the case is one of the deepest importance, and that it will be of far greater importance if the minds of the clergy are unsettled, and the matter of faith or doctrine is left abroad or unsettled, by any course pursued by your lordships, which shall send this case, by possibility, (I say advisedly, by possibility, seeing that there can be no probability) for inquiry into the doctrines of him whose confirmation is attempted to be set aside.

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The Attorney
General's
reply.

On Tuesday, the 1st of February, their lordships delivered their judgments *seriatim*. 1st. Feb. 1848.

Mr. Justice ERLE.—A rule for a mandamus to the archbishop of Canterbury, to hear and decide on the objections of the applicants to the confirmation of the election of Dr. Hampden to the bishoprick of Hereford, upon the ground of the unsoundness of some theological opinions published by him, has been moved for. In support of the application it has been contended that the archbishop, when confirming the election of a bishop in obedience to stat. 25 Hen. 8, c. 20, is bound to try judicially the validity of the election; and that persons present at the time of confirming have a right to state to him their objections to the person elected, and to demand his judgment thereon, and that this right may be enforced by mandamus in case of a refusal to hear. To this it has been answered, that the provisions of the statute are in direct contradiction to the right contended for.

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The question, therefore, turns upon the effect of the statute.

The preamble of the third section recites that the manner and fashion of electing, presenting, investing, and consecrating bishops had not been plainly and certainly expressed in stat. 23 Hen. 8, and for remedy enacts, by sect. 4, that the dean and chapter shall elect the person named in the letters missive of the king, within twelve days; and in case of their default, that the king may nominate and present to the archbishop, such person as the king shall think able and convenient for the vacant bishoprick. And by sect. 5, first, that in case of such nomination and presentment, the archbishop shall with all speed invest and consecrate, without any recourse to Rome; and, secondly, that in case the dean and chapter shall elect the person named in the letters missive, their election shall stand good and effectual to all intents, and the person so elected, after certification to the king, shall be reputed and taken by the name of lord elected of the bishoprick. Then the oath and fealty appointed for the same being made to the king by the person so elected, the king shall signify the said election to the archbishop, commanding and requiring him to confirm the said election, and to invest and consecrate the person

Effect of stat.
25 Hen. 8, c.
20.

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so elected. And by sect. 7, if any archbishop after any such election or nomination shall be signified, shall refuse, and do not confirm and consecrate the person so elected or nominated, within twenty days, or if any person shall admit any process to the contrary of the due execution of this act, such person shall incur the penalties of a præmunire.

Upon this review it appears to me that the power of nominating to a vacant bishoprick is given to the king, and that the archbishop has no authority to judge whether the king has properly exercised that power.

If, for default of election, the king nominates to the archbishop, the archbishop is made liable to a penalty if he refuses and do not consecrate within twenty days; and in this case it was not contended that he is empowered to sit in judgment upon the propriety of the king's nomination.

If upon any sufficient grounds within his knowledge he should remonstrate against the command, it is not easy to suppose that the penal law would be resorted to against him; still, if it were necessary to decide the right, the king, in my judgment, is here made supreme, and the duty of consecration is imposed on the archbishop, whether he approves of the person presented, or not.

Duty of consecration imperative on the archbishop.

In case of an election by the dean and chapter of the person named in the letter missive, the king is to command the archbishop to confirm the election; and this brings us to the point of contention between the parties, whether this command to confirm operates according to the usual meaning of those words, or as a command to try the validity of the election in respect of the regularity of the proceedings and the qualifications of the elected, and to adjudge whether it shall be confirmed or annulled.

According to sense of stat., a command "to confirm" does not include authority to annul.

According to the general rule, the words of a statute should be construed in their ordinary sense, so as to give effect to all its parts. Now, in the ordinary sense of the words, a command to confirm an election does not involve an authority to annul it.

If the other parts of the statute are regarded, it is provided that the election by the dean and chapter of the king's nominee shall be good and effectual to all intents, and the clause relating to the command to confirm immediately follows. Confirming, in its ordinary sense, is consistent with this provision; but it is a contradiction in terms to say that an election may be good and effectual, to all intents, that is, absolute and conclusive, and at the same time voidable and inconclusive.

The enactment that the person elected shall be reputed and taken by the name of the lord elected, is inconsistent with a power to adjudge him disqualified; and it is very notable that he is to make oath and fealty for the office before even the command for confirmation issues.

The enactment prohibiting the archbishop from refusing and omitting to confirm and consecrate for twenty days, and from admitting any process to the let of the due execution of the statute, is inconsistent with the supposed duty to invite and receive objections, and to decide whether he will confirm or refuse.

If analogy be consulted, no reason can be suggested why the nomination of the king, by letters patent, should be absolute; and the nomination of the king, by letters missive to the dean and chapter, should be subject to review. The statute, therefore, if construed by ordinary rules, does not operate to impose on the archbishop the duty, or to give to the applicants the right alleged.

But it is contended that the confirming of the election of a bishop by the metropolitan has a technical sense, to be found in the canon law, and expresses an examination by him into its validity, both as regards the proceedings of the election and the qualification of the elected; that this power of the metropolitan was exercised from the earliest times of Christianity throughout the Christian world, and had accordingly prevailed in England down to the time of Henry 8; and that, therefore, the legislature intended it should have this technical sense in the statute in question.

In support of these views, many passages from writers on the canon law and from historians were adduced. Also, the form of citing all opposers to appear and state their objections, which has been in use upon confirmations, at least from the time of Queen Elizabeth, was much relied on; and the advantage of giving to the archbishop this power of inquiry, and to the people this power of objecting to the bishop elect, was mentioned.

But these grounds are, in my judgment, untenable. In the first place, the reception of evidence of extrinsic facts, for the purpose of affecting the construction of a statute thereby, and altering the received meaning of known words, is dangerous, if not illegal. But supposing the evidence to be receivable, the assertion that any such usage of confirmation by the archbishop prevailed in England down to the time of the passing of the statute, does not appear to me to be proved. The preamble brings before us stat. 23 Hen. 8, from which it is to be gathered, that nomination and presentation by the king to the pope was the course then for the making of bishops, and that inconvenience had arisen from exactions and delay by the pope, and therefore provision is made for the king to nominate and present to the archbishop, and for the archbishop to consecrate the bishop so nominated in case of delay by the pope; and the course thus provided is described to be "according and after like manner as divers archbishops and bishops have been heretofore in ancient time by sundry the king's progenitors made, consecrated, and invested, within this realm." The making and consecrating of a bishop is mentioned several times in this preamble; but confirming is not mentioned, nor is there a sign in the statute that confirmation by the archbishop was then in use in England. The preamble asserts the former practice of the kings of England to nominate for consecration.

The reference to history leads me to the conclusion that bishopricks were donatives of the king under the Saxon and some Norman kings; from the charter of King John to the reign of Edward 3, bishops were elected by the dean and chapter, and confirmed by the archbishop; and that from the reign of Edward 3 to the time of this statute, the pope had superseded the archbishop, except on a few occasions when the papal see was powerless.

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Argument, in favour of the opposite construction, derived from the canon law and history, examined.

Received meaning of known words not to be affected by extrinsic evidence. But otherwise, such construction not proved.

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*Rules of canon
law respecting
confirmation,
pertinent only
to early ages
of Christianity.*

*Foreign canon
law not binding
in England.
Stat. 25 Hen.
8, c. 19.*

*Præconization
at confirmation.*

*Mere forms
and fictions
frequent in our
law.*

*Non-exercise
of opposition.*

Then, what foundation I would ask, has the Court for assuming that the usage of confirmation, in the sense now contended for, prevailed in fact, or was generally known down to the time of the statute, when the evidence is satisfactory only as to the interval from King John to Edward 3?

It is also necessary to ask what foundation in fact there is for supposing that the legislature referred to that part of the canon law relating to confirmation of ecclesiastical elections, which has been cited. The doctrine in that law on this subject is shown to have originated in the early ages of Christianity, when the whole Christian community being the church, joined in the election of bishops, and the rules were pertinent to contested elections by large numbers, but are extremely inapplicable in case of a nomination by the king, whether direct, or circuitous through the medium of a dean and chapter.

The foreign canon law has no binding effect in England; and the object of the statute which immediately precedes the statute in question, was to limit the canon law of England. It recites, that several canons were thought to be prejudicial to the prerogative, and repugnant to the laws and statutes of the realm, and creates a commission for revising that law, and provides, that until this revision shall be complete such canons only shall be used and executed as they were before the making of the act, and of these such only as were not contrariant to the laws, statutes, and customs of the realm, nor to the damage or hurt of the king's prerogative. It is improbable that the parliament which so regarded the canon law, intended to use the word "confirm" not in its usual sense, but in a sense admitting a reference to that law in limitation of the important statute now in question.

The proclamations purporting that those who object to the bishop elect shall be heard at the time of the confirmation, were next pressed upon us, as showing that the law was in accordance with their purport, and that the word "confirm" in the statute, was used in the technical sense before-mentioned. But, if the construction of the statute is as above stated, it is inconsistent with the right indicated by the form, and a proclamation would be of no avail against a statute.

Furthermore, if the proclamation be a mere form, it affords no presumption of any right; and, inasmuch as the election of a bishop by the dean and chapter is a mere form, and confirmation of an election is part thereof, the strong presumption is, that the confirmation of a merely formal election is itself mere form. Indeed, it is in effect enacted to be merely formal; for the statute declares the election to be good, which is the substance of confirmation, and therefore it leaves nothing but a form to be added.

It is obvious to legal experience that numerous forms of words prevail in our law, which are at variance with the fact they purport to state, some being vestiges of rights that have ceased, some being fictions to cover changes introduced in the law, and some from other sources. No reason is suggested why the form used by the apparitor at the confirmation may not belong to this class.

If it had been more than a form, the right of opposing would

probably have been exercised; yet no one recorded instance has been produced of an opposer having exercised the right now claimed by the applicants, in any country, or at any time. The industry and research have been extreme; no restriction has been placed on reference to any kind of work, English or foreign, legal or historical; and all that has been shown in the way of acting on the right, before the present year, has been the attempt against Bishop Mountague, in the reign of Charles I, which was evaded without a decision; and the reported intention of making the attempt in two other cases (*n*), which never reached to action.

If the evidence of the practical exercise of the right wholly fails, so does the evidence of opinion among the writers of recognized authority on English law. From Lord Coke to Mr. Justice Blackstone, no expression of any author has been adduced to show that the right in question was considered by him to exist, or had been brought to his notice.

The absence of usage, and the absence of recognition by text writers, is not merely a failure of support for the case of the applicants, but of positive force against them.

We were further pressed with the importance of a right tending to insure excellence in bishops, and to increase the confidence of the people in the Church establishment, and such results were urged as making the existence of the right probable. But if there are advantages on one side, the evils which suggest themselves to a practical mind, may more than counterbalance,—nay afford a strong argument to the contrary. But this inquiry is ill suited to the office of a judge, who has to declare the law as it is, not as it ought to be; and as the inquiry would lead to considerations that might seem disrespectful to others, if the abuses of the institution which may easily occur were pointed out, I merely suggest the nature of the answer that may be given.

Another point was made for the applicants in answer to the construction of the statute, namely, that the sole purpose of the legislature was to put an end to the interference of the see of Rome with the English Church, and that the statute ought to be so construed as to limit its operation to that result.

But the intention is clearly expressed both to prohibit the interference of the pope, and also to lay down substantively the manner and form of electing, presenting, and consecrating the bishops of the church so severed from Rome. Effect must be given to every part of the statute, and those who claim to be bishops of the English Church ascertain their title by its positive enactments, which are complete without the negative enactments relating to Rome: the full operation of the statute not only destroys papal influence, but declares the rights of the king, and fixes clear limits against encroachment; and the legislature, warned by the history of past troubles, had reason to provide against future contentions between the Crown and all ecclesiastical authorities.

After giving my best attention to the argument, my mind is brought

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Mountague's case.

Right contended for unsupported by writers of recognized authority.

Alleged importance of the right contended for.

Intention of legislature was more than putting an end to papal interference.

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to the clear conclusion that the supposed right does not exist, and that the rule for a mandamus ought to be discharged.

Mr. Justice COLERIDGE.—I am now to deliver my opinion upon this rule which has been argued at the bar with such remarkable learning and ability; and I cannot but express my regret that I am called on to do so at so short an interval after the discussion, and one, so much engaged, as entirely precludes the deliberate and satisfactory consideration of the argument and attentive examination into the authorities, which the importance of the question at issue deserves. I regret this the more deeply, because I feel myself compelled to differ, I fear, from my Lord, and, as I learn, from my brother Erle, not merely from the legal conclusion to be drawn from the arguments adduced, but upon the practical disposal of the rule before us. Upon the former I should express myself with diffidence, even if I had the happiness to have them concurring with me. The question, narrowly and simply as it may be propounded, has yet been argued, and properly argued, on grounds so large, and inquiries have been instituted so various, so wide, mounting up to such remote and obscure antiquity, spreading out into branches of law with which we are so little familiar, that it is rather excusable in an advocate than possible, I think, for a judge, to express himself with any strong confidence upon it. At least, speaking for myself, I must confess unfeignedly such is the state of my mind after such examination as I have been able to give to the subject. Upon the latter, the mere disposal of the present rule, I must avow in sincerity that I have no doubt; and it is a great consolation to me that by the course which I should recommend, any error of judgment into which I may have fallen, would not be final.

Agitation of
present ques-
tion, as affect-
ing the church,
and the peace
of the public
mind.

I am not insensible to some, it may be great, public inconvenience which might result from the needless agitation of a question such as the one before us. I own I think it has been somewhat exaggerated; but whatever may be its amount, it is to be remembered that there will be no light compensation in the more satisfactory settlement by a conclusive and final judgment in the highest resort, which it would then receive. But, after all, the inconvenience is not all on one side, and there is no consideration so strong with me as the danger of doing a final injustice, by unnecessarily taking a course which precludes all further consideration.

I cannot doubt that those from whom I have the misfortune to differ, entertain these feelings in general as strongly as I do myself; but I presume they think the present question one, with regard to which they cannot properly be indulged. They regard the application to the Court as mischievous, or at best of little practical importance; one not to be listened to with favour, to be complied with only so far as it is rested on the clearest and most demonstrative evidence. The course of my judgment will show to what extent I differ from them in this opinion.

On both sides it has been urged that the interests of the Church are at stake, and no doubt to some extent they are; but I trust and believe that in this respect also, some natural exaggeration exists on

both sides, and that when the ferment of the moment shall have subsided, it will be found that neither to have secured or enlarged her just freedom of action on the one hand, nor on the other to have laid more bare, or more firmly to have rivetted the restraints imposed on her by the statute, will have vitally affected those precious and immortal interests. For my own part, I am desirous, and I am not ashamed to confess it, entirely to forget, for a moment, considerations which affect the mind so powerfully as it may be to disturb its calmness, and to regard the mere question before me more coldly. In this feeling it is that I desire to rest my judgment on this narrow ground, simply on my conviction that the applicants have laid such grounds before the Court, as according to its usual course and the principles which have usually governed our discretion, entitle them to the writ of mandamus, and to call on the defendants either to demur, or to make a return.

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And the first questions which arise preliminarily almost in the way of the argument are, Is this the case in kind, in which a mandamus can issue? Have these parties such an interest as entitles them to demand it at our hands? Upon these by way of direct answer I shall be the less full, both because I believe the Court are agreed to the extent at least of thinking that there is no such difficulty on either point as should prevent the writ from issuing, and also because the more full and complete answer in both respects will depend on the result of the more general discussion that remains behind. For the present, therefore, I will only say that I think this was a case of an inferior court with a question before it for decision, in which parties lawfully summoned to appear, and having a sufficient interest, have prayed to be allowed to appear and to be heard, and have been refused.

Sufficiency of
interest in the
parties.

If this general statement be true, and I admit that its truth will depend on the result of the whole argument, I think it cannot be doubted that it is within the province of this Court by mandamus to compel the inferior court to admit them to appearance, and hear their allegations. Nor will it be an answer simply, that such inferior court is an ecclesiastical one, or the matter in discussion of ecclesiastical cognizance; the ecclesiastical courts, as such, are not withdrawn from the general superintendence or control which this Court exercises by mandamus, or prohibition over all inferior courts. We cannot, indeed, direct the course of their proceedings, or prescribe their judgments beforehand, nor review them in the way of appeal afterwards; they are the judges of their own practice, they are to frame their own judgments according to their own law, when that law alone is to be the rule of decision; but still we shall compel the ecclesiastical judge, as we would any other inferior judge, to act in his duty, just as we should, and constantly do, restrain him when he appears to be about to exceed his jurisdiction.

The present a
case within the
jurisdiction of
the Q. B.

This stands on the clearest principle, and it would, I believe, have been hardly necessary to say the few words I have said on this subject, but for the misunderstood case cited in the argument on this point, of *The King v. The Churchwardens of St. Peter's, Thet-*

Rex v. Church-
wardens of St.
Peter's, Thet-
ford.

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ford (o). That case is so often cited and its importance so magnified, that one is surprised to find its whole statement and argument comprised in six lines, and its judgment in less than two. The Court there refused a mandamus to churchwardens alone, to make a rate for the repairs of the parish church, saying, that it was a subject purely of ecclesiastical jurisdiction. I, for one, do not question, upon consideration, the propriety of that decision; though perhaps I might wish that the judgment had been reported at greater length, or expressed in less general or more qualified language. The whole subject-matter of church repairs and church rates is of ecclesiastical cognizance; to the ecclesiastical court the applicant was bound to go in the first instance, and there was no reason to suppose that that Court would close its doors against him; there was no alleged defect of justice, and therefore no ground for this Court's extraordinary interference. What bearing that decision has on the present case it is very difficult to see.

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of Carnarvon.

Nor, I think, does any difficulty arise from the fact that the ecclesiastical court here has heard one side, and proceeded to judgment. In the course of the argument, the counsel were asked whether any case had been found in which, under such circumstances, the writ had gone, and the answer was in the negative. Mr. Robinson has referred us to the case of *The King v. The Justices of Carnarvon*, in the 4th vol. of Barnewall and Alderson, p. 86, in which, on an application for a mandamus to sessions to hear where they had decided, Mr. Justice Holroyd said, "If it had appeared in this case that the sessions had heard one side, and had altogether refused to hear the other, I should have thought it the same as if the case had not been heard at all, and I should then have been of opinion that this mandamus ought to issue." It is always very satisfactory to have such authority as Mr. Justice Holroyd's for any position one lays down; but I confess that, without it on this point I should have had no difficulty. In regulating our discretion as to the issuing of a mandamus we are to be guided, I think, rather by principle than precedents. In order to secure the full and complete administration of justice, we are to regard substance, and not form, or we shall be entrusted to little purpose with this invaluable writ. If the case on the part of the applicants be in other respects well founded, the hearing that has taken place is the same as no hearing; the decision is no decision.

How the discretion of Q. B. ought to be regulated in granting mandamus.

Opposers not having been admitted as parties in court below, no possibility of appeal.

This last observation, with another closely connected with it, disposes of another objection, that the complaint of the applicants is in truth a complaint against the court below, of an error in its practice or its decision, and their remedy by appeal. If there has been no decision, there can be no appeal; if there has been no party, there can be no appellant. And so as to the right of a party to prosecute any particular suit in any particular court; that court may have its own rules according to which that question will be to be determined as it arises, and this court will not in general interfere with such rules, still less with the Court's decision upon them; but before the point

arises for decision, before the Court can apply its rules, the party must be admitted as a suitor to state his case.

Considerable stress was laid by the counsel against the rule, on the want of interest in the applicants to entitle them to come to us for the writ. On many grounds it seems to me that they had sufficient; they are all, indeed, involved in the general question, which will remain to be discussed presently. If the whole proceeding on which the inferior court was to be engaged was a mere form and shadow, if the citations to appear were mere mockery, interest in anybody there could be none; and on the same supposition these applicants have no interest here; at all events, it would be a waste of the time of the court even to listen to their application. But on the other supposition, which for this purpose they have a right to make, the citations themselves seem to give them an interest, and still more the relations which two of them, as incumbents in the diocese of Hereford, have in the faith and doctrine of their future bishop. We have more than once determined that the interest which an inhabitant, merely as such, and though no member of the corporate body, has in the good government of the borough or city which he inhabits, is sufficient to entitle him to be relator in a quo warranto filed to question the election of the mayor or members of the town council; the analogy between the two cases seems to me to be perfectly just.

It is not worth while to notice the objection founded on the Church Discipline Act, which could scarcely have been seriously urged, and I pass without further delay to the great question in the case, the proper construction to be put upon stat. 25 Hen. 8, c. 20. And in applying myself to that question I need not say in this place, that our object must be to ascertain, not what it might be supposed Henry 8 intended or wished, but the true meaning of what the legislature has written. If the former consideration could be properly admitted into the inquiry, or the evidence upon it ascertained satisfactorily, I have no reason to believe that it would be in the result unfavourable to the view I take of the statute; but on general principles that cannot be; it is not quid voluit Rex, but only quid dixit Parliamentum, that lawyers, indeed any reasonable interpreters of the law, can inquire into.

The statute in the fifth section enacts, that after an election of a bishop by the dean and chapter of the cathedral church of the see, the king shall signify the election to the archbishop of the province, requiring and commanding him to confirm the said election; and the question now for the first time to receive a judicial decision is, What is the import of this command? On the one hand, it is said, that it created a new duty in the archbishop, invested him with a new function, but that the duty and function, were both purely ministerial, and the act to be done a mere valueless form; on the other, it is contended that the act of confirmation is a solemn important judicial act, which from the earliest ages of the Christian Church it was a part of the archbishop's or metropolitan's duty to perform, and that the command in the statute was to perform that act, in virtue of that office, with all its attendant responsibilities in the officer per-

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Interest of the parties.

Church Discipline Act.

Construction of stat. 25 Hen. 8, c. 20.

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Mode of proving confirmation to have meant a judicial process.

Meaning attributed to the term in all previous times.

Meaning to be inferred from the stat. itself.

Meaning to be drawn from contemporaneous stats. in *pari materia*.

Usage then and since.

Probability of right a sufficient ground for granting *mandamus*.

forming it, and consequences to the election with regard to which it was performed.

It is obvious that those who maintain this latter ground, take upon themselves a large burden of affirmative proof. In order to show what confirmation means in this section, they seek to show what it meant from the earliest ages down to, and at the time of, the statute's passing; and no one will question, but that this, if satisfactorily made out, is both on legal principles of interpretation, and according to the plain common sense of mankind, a proper mode of arriving at the true meaning of the word. If the confirmation of a bishop elect was a process, known at the time of passing the act, of a certain nature, to be performed by a certain functionary, and having certain consequences, the language of the legislature simply directing that functionary to go through that process, would deceive and mislead, unless it were used in that sense, and as containing and involving every thing so known and understood.

I use the words "simply directing," because the legislature might use the word, though incorrectly, in any other sense; and if other parts of the statute make it clear directly, or by strong inference, that it was used in some other sense, unquestionably that must prevail. It is necessary therefore for the applicants to examine all parts of the statute, and to show that, taken altogether, no inference can thence be drawn, which contradicts the presumption to be drawn from their antecedent historical evidence.

Even if no such inference can be drawn from the statute itself, it might be, though not so easily or clearly, drawn from the provisions of other statutes contemporaneous or about the same period in *pari materia*; it was fitting, therefore, to take such statutes, if any, into the account. Lastly, it was right to examine, what, in point of fact, was done, and has been done, at the time or in succeeding ages, by those who were to obey the statute. No usage can control the unambiguous language of the law, no disuse can render it obsolete; but when the question is upon the meaning of the language, what has been done under it may be inquired into, as of more or less cogency, according to circumstances, in determining that question.

There are, then, four heads of inquiry. The first, third, and fourth may be considered, for the most part, inquiries into matters of fact; the second is one of construction. I do not propose to follow the applicants through them all; the time forbids my doing so satisfactorily, even with regard to those that I shall inquire into. In my opinion, they have made, upon each and all, a case so strong as raises a firm belief in my mind that the conclusion they come to is the true one; and I think they have on none received such an answer, or had such difficulties raised, as disentitle them to the writ they ask for. This is enough for me to assert. By the practice of this Court, as I have always understood it, and as it has been acted on uniformly, since I have had the honour of practising at its bar and sitting on its bench, the discretion of the Judges has been regulated as to the issuing of the writ of *mandamus* thus: they have not required absolute certainty in fact, or a clear or unanimous opinion in law, as the ground of issuing it. If the fact be made so

probable as to require an answer in reason, or an answer be attempted in the affidavits of those who show cause, it has been thought right to let a jury decide the question. If the conclusion of law be probable in favour of the motion, or the question be one of difficulty, requiring a solemn decision, it has been thought right to let it be raised on the record. Since the recent interposition of the legislature (*p*), which has made our judgment on such record subject to revision in Courts of Error, it is obvious that the reason for this latter branch of the rule has received a much increased force.

Two general remarks must still be made before I examine the historical evidence prior and down to the passing of the statute. If that evidence were now before a Jury, and a Judge were summing it up, I apprehend it would be his duty to tell them that it was to be considered by them with a reasonable allowance for the circumstances under which it was produced, and among those, especially the length and remoteness of the periods through which the chain was sought to be carried. To expect that a title which is to be traced down for centuries, through periods, many of them, of struggle and disturbance, which was subject to the confusion occasioned by contending claims and foreign usurpations, should be made out with the unbroken continuity and uniform clearness which might properly be required in discussing a simple transaction of to-day, could not even then be required, because it would be impossible to accomplish, and therefore unreasonable to ask for it. Independently of the effect of these circumstances on the evidence, they must be expected to produce something of a similar kind on the title itself, or series of facts which is the subject-matter of the evidence.

What we said in a case in which we had to consider an ancient franchise of the University of Cambridge, being invited to disturb its enjoyment on ingenious objections, may be not improperly applied here. "It follows," we said, "almost necessarily, from the imperfection and irregularity of human nature, that a uniform course is not preserved during a long period: a little advance is made at one time, a retreat at another; something is added or taken away from indiscretion or ignorance, or through other causes; and when, by the lapse of years, the evidence is lost which would explain those irregularities, they are easily made the foundation of cavils against the legality of the whole practice. So also with regard to title: if that which has existed from time immemorial be scrutinized with the same severity which may properly be employed in canvassing a modern grant, without making allowance for the changes and accidents of time, no ancient title will be found free from objection; that, indeed, will become a source of weakness, which ought to give security and strength" (*q*).

If considerations like these ought to have place, and such language to be held, in regard to this evidence, on a trial before a jury, it is obvious that, in the present stage of the inquiry, they have tenfold propriety and weight. I do not present it as an analogy strictly conclusive; but the province of the Court at present resembles more

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Allowance to be made for the circumstances under which the historical evidence in this case has been produced.

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(*p*) By 6 & 7 Vict. c. 67.

(*q*) *Regina v. Archdall*, 8 Ad. & Ell. 288.

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Province of
Court at pre-
sent resembles
that of Grand
Jury, present-
ing a case for
further inquiry.

Historical evi-
dence prior to
25 Hen. 8.

General Coun-
cils.

Canons of
Councils of
Nice and Chal-
cedon.

that of the Grand than of the Petty Jury. If we refuse the rule, we do indeed preclude further inquiry; we pronounce our opinion that there is nothing to be inquired into; either that the evidence is so worthless or irrelevant, or the subject-matter so unimportant that we will shut the door of justice on the prosecutor; but if we grant it, we only say the present state of the proof requires an answer; enough has been done to make the case fit for further inquiry and more solemn decision. If this be so, surely we ought to examine the evidence with candid minds, making due allowance for all its inevitable difficulties. We should remember that it travels into remote periods, and turns upon facts of a kind which do not often come before us, and a law and legal literature with which we cannot be familiar. Whatever decision we now pronounce (I speak as I feel for my own share in it), is more than commonly obnoxious to error: it is a safe rule—a conscientious rule—it is *the* rule of the Court, as I at least understand it, to decide so that error may be less likely to end in final injustice.

It is under these conditions that I enter on the inquiry I propose to make. The case on the part of the applicants commenced with evidence offered even from the Apostolic ages of the Church. I am content to start with the General Councils. I presume the authority of these Councils, on a matter of Church government in England, before the Reformation, will not be questioned. Even as to matters of doctrine, their authority is expressly recognized by the Legislature, after the Reformation in the stat. 1 Eliz. c. 1, s. 36. At a time when Christendom was united as one body, it was considered to represent the whole inhabited earth; and when the springing up of any important heresy or other such urgent cause occasioned the assembly of a Council from all nations, it was œcumenical, τῆς οἰκουμένης, and bound all the members of the one entire body. Four great heresies, it is well known, occasioned the summoning of what Hooker calls “four most famous ancient General Councils;” and of these we have canons by two, those of Nice and Chalcedon, which speak of the confirmation of episcopal elections, in terms, as being penes Metropolitanum; that one elected præter voluntatem et conscientiam Metropolitanum ought not to be a bishop, non debere esse Episcopum. Limit these last words as you please, though, if you construe them by the light of the former, you cannot much reduce their force; assume, if you will, that these canons had reference to a period when elections of bishops were more popular than even in form they have been in England since the Conquest, though both Councils, be it observed, were called by Imperial authority after the civil establishment of Christianity, and after the Rulers of the earth had assumed part in the nomination to Bishopricks; still you have the undisputed fact, that in those very early ages the Metropolitan did intervene; his confirmation was necessary to complete the election of one of his Comprovincials. Could any thing be more reasonable than that he should intervene, when he was to administer consecration, and when the bishop elected was to rule over a diocese within his province, subject to his visitatorial power, liable to deposition at his hands?

I am compelled to pass over a large body of evidence of the same kind, some from General, some from National Councils; for I am only indicating the grounds of my opinion, not going into the whole detail of the evidence. These precede the rise of what is called the general canon law. Now, as I understand it, it is not so much contended that, under this law the point is not satisfactorily made out, as that there is no ground for admitting this law, as of any authority in settling the question with regard to England. When we speak of England before the Reformation, I confess I hardly understand this difficulty. We speak, then, of a country within the pale of the Roman Catholic Church, admitting "our holy father, the Pope," as he is commonly termed in the very statutes which sought to restrain his usurpations, to have in spiritual causes and matters appellate jurisdiction from all ecclesiastical judges here. The canon law regulated all decisions in spiritual matters at Rome. The decrees of Councils and of Popes, the Opinions of learned men, and other sources on which it was founded, would be naturally received as authority in the courts of other countries from which appeals lay to Rome. In this country they obtained their binding authority, no doubt, from custom, and were subject to the control of our statute and common law. Some instances of this control are familiar to lawyers, but it operated in comparatively few and exceptional cases. As the general rule, it is quite safe to say that our ecclesiastical courts governed themselves by the general canon law, which was, in truth, the law of that one Catholic Church, of which the English Church was a branch. Concurrently with this, however, we had a National Canon law, not a complete system, or furnishing a rule of decision, if taken by itself, for all cases; for this was founded solely on the occasional Legatine constitutions, or ordinances of National or Provincial Synods. Upon these we have the comments of Lyndewood and John de Atho, which show conclusively that they were never intended to overrule generally, or supply the place of the General Canon law, or to do anything more than to supply deficiencies, where particular local circumstances made it necessary.

In this part of the argument it is hardly in course to consider the effect of this law after the Reformation, but I stop for one moment in consequence of an observation or two which has been made, to offer an observation upon stat. 25 Hen. 8, c. 19, as it affects the present state of the canon law in this country. Now, the proviso which has been referred to at the close of this statute, refers expressly to the preamble and is confined to it; but that preamble is not speaking of the general Canon law, it is speaking of the Canons that had been ordained in the Provincial Synods or Councils of this country. "Whereas," it says, "the King's humble and obedient subjects, the clergy of this realm of England, have not only acknowledged according to the truth, that the convocation of the same clergy is, always hath been, and ought to be assembled only by the king's writ, but also submitting themselves to the King's majesty, have pronounced in verbo sacerdotii, that they will never from henceforth presume to attempt, allege, claim, or put in ure or enact, promulge or execute any new canons, constitutions, ordinance provincial or other, or by whatsoever other name they shall

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Authority of the canon law in England.

General canon law.

National canon law.

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be called, in the convocation, unless the King's most royal assent and licence may to them be had to make, promulge, and execute the same, and that his Majesty do give his most royal assent and authority in that behalf. And whereas divers constitutions" (the lawyer immediately remembers the constitutions of Othobon and Otho that are stated in Gibson), "ordinances and canons, Provincial or Synodal, which heretofore have been enacted and be thought not only to be much prejudicial to the King's prerogative royal, and repugnant to the laws and statutes of this realm, but also overmuch onerous to his Highness and his subjects, the said clergy hath most humbly besought the king's highness that the said constitutions and canons may be committed to the examination and judgment of his Highness and of two and thirty persons of the King's subjects." And then it goes on to state the terms of the commission which is to be appointed for the investigation. Then, after enacting the mode in which the Commissioners are to proceed, it provides:—"That *such* canons, constitutions, ordinances, and synodals provincial being already made, which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the King's prerogative royal, shall now still be used and executed as they were afore the making of this act, till such time as they be viewed, searched, or otherwise ordered and determined by the said two and thirty persons." It is well known that that Commission never was effective, and it is upon that footing that what I call (distinguishing it from the general canon law) the National Canon law of this country at present stands.

When, then, upon a point of ecclesiastical law arising before the Reformation, the decretals or works of the Canonists are cited, surely the presumption is, that they tell us truly what the Church law in England then was, and the onus lies on him who would allege that, by reason of some statute or contrariant rule of the common law, the case was not decided by them.

I do not cite again the different passages referred to in the arguments, nor enter into the criticism which was addressed to show that some of them did not apply to confirmation of Episcopal elections. The result, to my mind at least, left it clear that what had been decreed by Councils had been adopted into the Canon law; that elections were subject to confirmation by the Metropolitan; that such confirmation was a real judicial proceeding; that the process of the election, *processus electionis*, and the *persona electi* were the subjects for consideration; as to which witnesses were examined, and the result was not unfrequently unfavourable to the elected. It was contended that "*persona electi*" limited the inquiry only to his identity; but this was conclusively disproved by the causes assigned more at length in some of the cited passages, and also in some instances actually recorded in history, from which it appeared that the morals, learning, legitimacy, any thing, in short, which went to make up canonical fitness, were made the subject-matter of inquiry. And I may observe, in passing, that I do not remember a single instance in which the *persona electi*, limited to the point of mere identity, was ever brought into question at all.

When it was sought to show the actual application of this law of

The canon law
enjoined con-
firmation by the
metropolitan,
as a judicial
proceeding.

Metropolitan's
right of con-

confirmation to elections of English bishops, a difficulty was raised to which the frequent struggles between our Monarchs and Rome lent a colour. When the Monarchy was weak or the throne contested, the Papal power often made advances; the practice of Provisions would often interfere with the Metropolitan's confirmation, for if the Pope nominated, of course a confirmation was needless: often, too, it would be that that which was properly the appellate jurisdiction, would draw to itself improperly the original cognizance. Still, after every deduction made on these accounts, a body of proof remains substantial and abundantly satisfactory, that the ordinary jurisdiction of confirmation was in the Metropolitan.

Here I allude, as I intended to do before, to the instances cited from Wharton's *Anglia Sacra*, a book undoubtedly of great interest, not merely, be it remembered, a modern work—to speak as modern of any work written in the 17th century—not merely an original work of the author at that time; but, as it appears from examining into it, in great part a collection from ancient, and some of them contemporary writers. The instances adduced by Mr. Badeley, ranged from 1277, 5 Edw. 1, to 1416, 3 Hen. 5 (*r*). I do not mean to repeat them, but I take the first, for two or three reasons; it is remarkable for several circumstances which are mentioned in it. The monks of Winchester elected Robert the bishop of Bath and Wells; the Archbishop of Canterbury rejected him for having formerly been a pluralist, and this was done by virtue of a Canon of the council of Lyons, passed only three years before. It is observable that in one of the Constitutions of Otho or Othobon, I forget which, the same circumstance, pluralitatis causa, is made the ground of objection to the election of a bishop. A second elected in his place was rejected by the Archbishop, for the same cause. Here we have two instances in which a canonical offence first created by a foreign council, was made the ground of rejection. Upon the second occasion, the Bishop elect appealed to the court of Rome, where he was opposed by the primate who is spoken of as a man, *ecclesiasticæ disciplinæ observantissimus*. Wharton says, he was so intent on sustaining the rejection as to declare that he would resign if the case were decided against him, and he succeeded in having his judgment confirmed. But then the Pope took occasion to appoint to the vacant see himself, and caused the consecration to take place at once at Rome. The new Bishop appears from his name, Pontissara, to have been an Italian, already archdeacon of Exeter, probably by Papal Provision, and Professor of Civil law at Modena. This extract, while it is strong to show the reception of the Canon law, the jurisdiction of the Metropolitan, and the reality of the confirmation, shows also the irregularities which would often occur and disturb the exercise of that jurisdiction, owing to Papal interference.

This author is full of instances which show the operation of Papal Provisions, and of appeals to Rome, in the most interesting manner. The case of Robert Orford, the fourteenth bishop of Ely, I may

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firmation often disturbed by Papal interference.

Wharton's *Anglia Sacra*.

Instances from it.

(*r*) Wharton's *Anglia Sacra*, vol. 1. 640, 713, 719, 732, 733, 736, 755. pp. 315, 349, 357, 417, 531, 631, 637, *Supra*, p. 345.

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mention as an example, where, after election objected to, and cancelled by the Archbishop, the party goes to Rome and appeals against the rejection. A discussion is stated to have taken place before the Pope and his Cardinals, a statement is made by the Bishop elect to the Pope, of the examination which he had undergone, and the answers that he had made. He appears to have conducted himself so well, that the pope says, “‘Certe, fili, bene respondisti. Non te invenimus, sicut scripsit nobis frater noster Cantuariensis, vas vacuum, immo vero omni bonitate et scientiâ repletum te esse approbamus.’ Et suam confirmavit electionem ac ibidem celebrari fecit ipsius consecrationem.” Here is an instance in which the appellate court pronouncing the judgment which ought to have been pronounced below, carries it into effect by celebrating the consecration upon the spot. The termination of this affair shows an instance of the real grievance which this country sustained under Papal exactions and usurpations; for it is said, “His itaque negotiis feliciter expeditis, iter versus Angliam statim arripuit, et ad suam Elyensem ecclesiam prosperè pervenit, plus quam xv. millibus librarum ære alieno oneratus.” So that the appeal had cost him 15,000*l.*, the enormity of which sum at that time of day can be easily ascertained.

Case of J.
Wakeryng,
Bishop of Nor-
wich. Practice
during the
Papal schism.

I have stated that the latest instance which I have noted, as referred to in the argument, was of the year 1416; the case of John Wakeryng, bishop of Norwich (*s*). He was confirmed by the Metropolitan, under circumstances which at first sight create a difficulty, but I think on consideration are not only explainable, but may serve to throw light on the language of the statute now in question. This was the period of the great Papal schism. There were three Antipopes; Henry 5, preserving a neutrality between the rival candidates, treated the see of Rome as vacant, and by consequence those bulls and briefs which had become established as necessary to the completion of episcopal election, could not be procured from any one. An act of Parliament, therefore passed in 3 Hen. 5, reciting that, for this reason, confirmations could not be made, and great inconveniences followed, and enacting that during the avoidance of the Apostolic see, Bishops elect should be confirmed by the Metropolitans, without excuse or delay made on that account, and that the King's writs should issue to the Metropolitans, straitly charging them to perform the said confirmations, and all that to their office therein appertains; and also to the elected that they should effectually pursue their confirmations before the Archbishop. In the fourth volume of Rymer, in the second part, p. 156, will be found the writs accordingly issued both to Wakeryng, the bishop elect, and the Metropolitan for the confirmation. That to the latter enjoins him to proceed, “Absque excusatione seu dilatione aliquali procedatis ac cætera omnia, quæ vestro canonicè incumbunt officio, in hac parte peragatis, et exequamini.” It is not to be inferred that the confirmations were ordinarily by the Pope, but that the Metropolitan could not proceed to confirmation or the other duties which were canonically incumbent on him as such, upon the election of a

suffragan within his province, without a mandate or bull from the Pope. The language of the statute and writs shows that confirmation was part of the canonical duty of the metropolitan, and it shows also that at the time the King's assent to the election was not sufficient by the common law of the church without the Pope's sanction to the confirmation. The stat. Hen. 5 was a temporary measure, which met the difficulty occasioned by a vacancy of the Apostolic see; nothing can be stronger to show the imperfectness of the royal title of itself completely to fill up Bishopricks. We find from Wharton, (p. 417), that when the council of Constance had terminated the papal schism, and Martin 5 was elected Pope, he ratified both the confirmation and consecration of this very Wakeryng, who had attended the council, with other ambassadors from Henry.

With the election of Martin, the stat. Hen. 5 would expire, and that state of things would revive, which the several statutes of Henry 8, passed shortly before 25 Hen. 8, c. 20, and that statute itself show us to have been then existing; the chapters electing, with apparent freedom, but certainly under the indirect influence of the Crown; the Pope then upon request issuing various bulls, which had been made necessary, no doubt, for the purpose of exercising influence and exacting money; among others one to the Metropolitan to proceed canonically to confirmation and consecration; the metropolitan then undertaking the confirmation, subject to appeal, and finally on approval, if no appeal made, or the Pope did not by some assumption of power interpose, the consecration.

Before I pass from this part of the subject, let me observe, that every case of Papal confirmation and consecration must not be taken as evidence against the Metropolitan's ordinary power. Rightly or wrongfully (and, had the bishop of Rome, happily for Christendom, been content with the lawful precedence and power which he might have claimed as Patriarch, he would rightly have claimed appellate jurisdiction in such matters), but, at all events, as matter of fact, he claimed and exercised it; if, therefore, he decided an appeal in favour of the bishop elect, his decision was in fact a confirmation, and he might, as appellate judge, then execute the duty of the inferior judge, and consecrate at once; when beyond this he took on him, having rejected the bishop elect, to confer the see on a nominee of his own, this was a mere usurpation, growing out of his wrongful assumption of the title and place of Universal bishop of the whole Christian Church.

I now close an inquiry which I am sensible I have been led to follow to a wearisome length, and yet cannot expect, imperfectly as the case has been expanded even at this length, to have conveyed so clear a view to others, as I seem to myself to have, or so strong a conviction that when Henry 8 and his parliament came to legislate with regard to episcopal elections, they had to deal with confirmations by the metropolitans as real transactions, judicially conducted by them, in virtue of a jurisdiction from the earliest times inherent in their office. We are now to see how they have dealt with confirmations in the famous statute under consideration, but the examination which I have to make of its several clauses will be more intelligible, if I preface them with a statement of the general view

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Practice after the termination of the Papal schism.

Papal confirmation and consecration not always evidence against the metropolitan's ordinary power.

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Coleridge.*

*General policy
and purview of
stat. 25 Hen. 8,
c. 20. First,
to secure the
royal power in
the nomination
of bishops.*

*Secondly, to
prevent Papal
interference.*

*Form of elec-
tion preserved ;*

*But neutralized
by the letter
missive.*

*Confirmation
left as before.*

which I take of its policy and purview. And in forming this, I think myself bound as a lawyer, to regard only the legitimate and certain guides to interpretation, which the state of things at the time it passed, the existing mischiefs proposed to be remedied, its own language, and cotemporary statutes afford. The personal character or wishes of the Monarch, on the one hand, it would be unsafe to attach much importance to, unless I knew, on the other, the amount of ability, sound heartedness, devotion, or power, which might be found in the individual framers who penned, or in the united body which enacted it.

I conceive, then, that there were two prevailing objects; the first, to put on a clear foundation the royal power in the nomination of bishops. Although the Crown's right to present was in substance well acknowledged, whether depending on the supposed right of patronage, or the inherent and constitutional right of the Crown; yet, in the theory of the law, the office of bishop was an elective one, and elections were free, and these two principles would sometimes be found in contest with each other; the exercise too of the Crown's right, in spite of previous statutes, would, sometimes, indeed not seldom, be impeded by Papal interference, in the way of Provision. I may, in passing, observe, that the recitals of ancient statutes, and the language of our text-books, place the right of the Monarch much more on patronage than on Imperial power. The bishopricks were donatives, in the commencement; because the Crown had founded and endowed them. When, at an early period, elections revived, the Crown was still patron, and presented; but then revived confirmation; and the analogy between a bishoprick and an inferior presentative benefice was in this point complete. The second, and perhaps more urgent object was, effectually to prevent all interference from Rome with the completing the making of the bishop whom the Crown should have nominated, and also to secure the prompt obedience of the Metropolitan to the royal commands.

For effecting the first object, it was not thought necessary, probably not desirable, to alter the ancient canonical mode of proceeding by election. If lawyers and canonists were engaged, as is probable, or consulted, in the framing of the act, they would be aware of many inconveniences which might arise from a departure from the ancient mode. The law had attached certain rights to certain steps in the process (See *Evans v. Ascuthe*, Palm. 472), and evils, foreseen and unforeseen, and of course not easily to be guarded against, might be apprehended. If divines, as is still more probable, were consulted, they would naturally be slow to sever one link unnecessarily from the venerable chain which bound our Church in communion with the great Christian commonwealth. Election, therefore, was preserved, but as it was to be preserved in form only, that change was clearly and unambiguously made by the introduction of a new instrument, the letter missive; and the statute was so worded, that no question could possibly be raised; nothing was left to cavil or exception.

Assuming that the Chapters proceeded according to law; for effecting the second object nothing new was required to be added in the remaining steps. Some things would be to be taken away. There would be confirmation, still as necessary as before, for there

was no intention to interfere with the Metropolitan's inherent powers, or to disturb the ancient relations between himself and his Suffragans, and the King might be deceived in his appointment, and did not arrogate to himself spiritual powers. Not a word, therefore, was admitted which might be interpreted to derogate from the Metropolitan's jurisdiction; rather it was increased, by relieving it entirely from all Papal review. Consecration would follow on confirmation, as before; but in both it was necessary, especially at the time of the enactment, both to guard the Metropolitan on the one hand, and the Church and the Crown on the other, in the case of Romish tendencies in the Metropolitan, from every sort of Papal interference or impediment, by the severest sanctions.

If these were all the provisions of the statute, there would be no difficulty in the view I have presented of it; but something remains. Two parties were concerned in the making of a bishop, after the nomination by the Crown. The electors and the Metropolitan both might thwart the nomination; the former by refusing to elect, the latter by refusing to confirm and consecrate. The former might be punished for disobedience, but could not be compelled to elect; and therefore in the place of a formal election, where that was refused, the king was to nominate by letters patent. In reason, perhaps, it might have been expected that in this case some new process equivalent to confirmation should have been provided. Confirmation itself in terms would not be preserved; for that was the act of a superior authority, and would have been a scarcely decorous process to be carried on in respect of one who was the direct grantee of the Crown, and ancient usage, besides, had appropriated that process to election. The Crown would be unwilling to create anew any substitute, and it was the less necessary because the Metropolitan's power and responsibility remained untouched in the consecration; and though he might be punished for wilful and groundless refusal to consecrate, he could not be compelled to do that act; and no provision was made (a most remarkable circumstance) for procuring the consecration by any other means of him whom the Metropolitan should refuse to lay his hands upon.

Let us now see whether the statute itself does not agree with the view I have presented. The first and second sections recite those parts of 23 Hen. 8, for restraint of payment of annates to the see of Rome, which regarded the impediments to consecrations growing out of the alleged papal exactions, and provided conditionally for the consecrations to proceed without regard to the papal bulls where they were vexatiously delayed; and state that these provisions had been made absolute by the king's ratification of them, in consequence of the failure of any satisfactory settlement with the court of Rome. The grievances suffered from the court of Rome are presented as the mischief to be remedied, and the whole spirit and language are studiously hostile. He who in the recited statute but two years before had been our "Holy Father the Pope," or "His Holiness the Pope," is now the "Bishop of Rome," otherwise called the "Pope;" and the "Court of Rome" is changed to the "See of Rome."

The recited act had made only the conditional provisions before

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Direct nomination in case of refusal to elect.

No provision in lieu of consecration, in case of refusal by the metropolitan.

Agreement of the stat. with the view thus presented.

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alluded to; but had not plainly and certainly expressed in what manner, for the future, archbishops and bishops should be elected, presented, invested, and consecrated. The third section of the act therefore first takes away absolutely for the future all presentations to Rome, all procuring of bulls or palls, or other things requisite for an archbishop or bishop from Rome, and all payments of any kind for them.

Thus far every word in the act is directed against Rome. In the fourth section begin the positive provisions. First comes the licence under the Great Seal, "as of old time hath been accustomed," to proceed to an election. Here the word "election" is used as a known term; no form is prescribed; everything is to be done in this respect as before. Then is added the new "letter missive," containing the name of the person whom the electoral body shall elect and choose; they are then, "with all speed and celerity," in due form to elect the said person named, and none other. The object of election has now been spoken of twice simply as "the person;" no qualification of any kind has been mentioned, nor will any be found through the whole statute; and the crown lawyers are driven to contend, as they have done, that no qualification was intended, nor can be admitted. As to canonical age, they say that a restraint on the generality of this act was created by later statutes, the statutes of Edward 6 and Charles 2; but even as to that they contend that the Crown was unfettered when this act passed; and as to every other canonical impediment, every consideration of learning, morals, and faith, is so at this moment. As I understood, and I should be very sorry to misrepresent the argument of one of the learned counsel, he met the difficulty of canonical impediments by attributing to the Crown, as supreme head of the Church, the dispensing power of the Pope, and affirmed that the mere act of naming a minor in the letter missive was a virtual and effective exercise of the power (*t*). I will only say these are strange arguments to be now advanced, against which, as a member of the English Catholic Church, I strongly protest. Whether it may be that the letter missive joined to the licence to elect can be taken in such a sense to reduce the election to a mere form so as to make the act of the electors merely ministerial, and therefore to render all consideration of qualification quite immaterial, it is not necessary now to decide, and I will not take on me to affirm. I should rather think that the silence of the whole act as to qualification is to be attributed to this, that it was passed entirely *alio intuitu*, and left that matter to be considered, as it had been before, by the proper ecclesiastical authority.

Upon failure of an election by the delay of the chapter, the statute next authorizes the Crown to nominate and present by letters patent such person as it shall think able and convenient; and, by the fifth section, the archbishop of the province, for to him alone, if there be one at the time, the nomination and presentment must be made, "shall with all *speed and celerity* invest and consecrate" the patentee, "and give and use to him pall and all other benedictions, cere-

No power
vested in the
crown of dis-
pensing with
canonical im-
pediments.

monies, and things requisite for the same, *without using, procuring, or obtaining hereafter any bulls or other things at the see of Rome for any such office or dignity, in any behalf.*" Here, as before, with regard to the election, the words "all speed and celerity" are introduced; the consecration is to be in the ancient form, all the same ceremonies are to be used, but without procuring any authority from Rome. It is not a command to the archbishop simply to consecrate, but to consecrate "with all speed and celerity," so as not by delay to allow time for impediments from Rome to arrive, and without himself suing for or procuring any authority whatever from Rome.

The statute then returns to the elected bishop. "Their election," it is enacted, that is, the election of the electors, "*shall stand good and effectual to all intents and purposes;*" and after certification of it to the Crown, the person elected "*shall be taken and reputed as lord elected*" of the see. These are words on which great reliance is not unreasonably placed, and it would be uncandid in me to deny that I have felt their weight; but they seem to me to be inserted with a twofold view: first, to meet one of the great divisions into which the inquiry at confirmation was by the canons branched—I mean the *processus electionis*; so far as the electors were concerned and their act of election, there was to be no impeachment of their proceeding; whether the party were qualified canonically, or not, their act was good, and the party became Lord elect; and, secondly and mainly, this election was to have its virtue without the aid of any Papal allowance.

The Lord elect is then to make his "oath and fealty *only to the king,*" prohibited thus from any oath of subjection to Rome; and the Crown shall signify the election to the Archbishop, requiring him to "*confirm the said election:*" the words "speed and celerity" are here omitted, and he is required "to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same, without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome for the same, in any behalf."

Upon this section the question turns. The archbishop is directed "to confirm and to invest and consecrate, and to give and use all such benedictions," &c. No description is given of any one of these three things. If he had asked immediately after the statute passed, "How invest? how consecrate?" the answer would be, "As you did before the act passed, except where it specially provides to the contrary." If he had asked, "What will be the legal effects of investiture and consecration?" the only answer would be, "The same as they were before," "What are my functions in investing and consecrating?" The same answer surely must be given; and if the same questions were put as to confirmation, must the answers all be different? "You were a judge before, you are a minister now; you were bound to inquire and examine before, you can do neither now; you were bound to reject one whom you believed improper for the office before, you cannot do so now." If such answers were given, might not the inquirer ask on what words in the statute they were

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The spiritual
functions of the
metropolitan,
in confirming,
investing, and
consecrating,
left unim-
paired.

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founded? If there were no clear words, on what strong implication they rested? And would he not be entitled to demand the strongest implication before he consented to any thing so seemingly unconscientious? or could he think any implication strong enough if he found that he was still expected to proceed in this new thing, mis-called confirmation, according to the same judicial form, and still worse with the same religious rites accompanying and seeming to sanctify it, in the house of God, as he had been accustomed to before, when it was no form, but all in substance, which it assumed to be?

But if the words which close the sentence and refer to Rome be only held to override the words "confirm, invest, and consecrate," as they not unnaturally would do, not only this great difficulty is avoided, but a meaning is given to the whole which is perfectly consonant with the purview of the act, and, in addition, a great defect is removed from its provisions; for then it cannot be objected that the Crown may make any one a bishop—heretic, infidel, or bad liver—without reference to age, orders, or canonical qualifications of any sort. It can only do what the electoral body could have done before, however constituted, in all ages of the Church, subject only to the judicial inquiry of him on whom the Church, not the Crown be it observed, had cast the most responsible duty of consecration.

Consideration
of confirmation
inseparable
from that of
consecration.

I think it was felt in the course of the argument that, unless it was possible to separate the consideration of consecration from that of confirmation, a very great difficulty was cast upon the crown lawyers. I own I think that that separation cannot be made. I think that that difficulty cannot be removed. I would ask, then, any person of ordinary sense and conscientious feeling to read the order of consecrating bishops now, or the order of consecrating them in the time of Edward 6, nearer to the period of the Reformation, of which we are speaking, which may be taken undoubtedly not to be a whit more stringent or more solemn than the rites of the Roman Catholic Church in the same respect, and let him tell me whether it is possible to suppose that the archbishop proceeding in that function of consecration, proceeds merely ministerially.

The seventh section follows, with its penal clauses. It is divided into three parts: first the electors for not proceeding to election, and signifying the same within twenty days; secondly, the Archbishop or Bishop for refusing, and not confirming, investing, and consecrating with all due circumstance, within twenty days after signification or presentation; thirdly, these, or any other person, for admitting, maintaining, allowing, obeying, doing, or executing any censures, excommunications, interdictions, inhibitions, or any other process or act, to the let of the due execution of the act, and their aiders, counsellors, and abettors incur the penalties of *præmunire*.

In the two first cases, a time and a short time is set; and from the shortness of the time it is inferred, that the acts to be done must necessarily have been such in their nature as might commonly be done within those short periods. This argument, however, assumes the nature of the non feaſance, which would bring a party within

the penalties. If every, even honest, delay which overran the twenty days were conclusively a breach, there would be something in it; though even then it may well be supposed that, even as regards confirmation, the only one to which the argument applies with any force, ordinarily the process might be expected to close within that period, and as short a period as could reasonably be assigned we should expect to find allowed in an act, all through which the fear of process from Rome is most apparent. But in truth the argument falls to nothing, if in confirming the archbishop was engaged in a judicial act; for then I have no doubt that, if while honestly engaged in prosecuting it without delay, he was prevented from completing it within the time by the necessary length of the inquiry, he would have a perfect answer to an indictment. The twenty days may have been quite long enough to ascertain whether he was wilfully and capriciously refusing to obey the statute, and in that sense I believe the limitation of time to have been enacted.

I have now very imperfectly, and very hastily, though on that account at the greater length I fear, examined this statute. In the course of the argument the phrase "Magna Charta of Tyranny," was used with reference to it, with a personal allusion, of course perfectly understood (*u*). According to my view, this term appears to me exaggerated. The statute in that view is indeed excessive in the measure of its punishment; but that excess may well be excused with reference to the usual standards of punishment in the age in which it passed, and by considering that it did but adopt a mode of punishment which it found in the statute book, appropriated as it were to offences of a similar kind, those namely, of improper communications with the See of Rome. It is to be remembered, that so late as in the last century only, the same punishment, with no such excuse, and only under the mad excitement of the moment, was awarded for frauds committed against the South Sea Bubble Act (*v*). But if the statute be rightly construed by the crown lawyers, then the phrase is, in my opinion, a perfectly just, a strictly measured one, not because it casts off the vexatious interference of Rome, with a somewhat rough hand, or asserts the prerogative of the Crown in the nomination of Bishops, with over-urgent severity; but because it bids freemen and Christians still to wear the garb of freemen, and use the most solemn ordinances of their religion, yet bear an intolerable yoke on their consciences, and profane those ordinances by the most bare-faced mockery; because it commands the highest officers in our Holy Church to assume the form and countenance of judges, to hold the semblance of an open court, to invite opposers, and swear witnesses on the Gospels, to pronounce a solemn sentence in the name of the Saviour, and yet tells them that all this is but shadow and sham, that they are but ministers and servants, with no more discretion as to the acts they perform, than the merest slave of the most absolute master; because, worst of all, if worse can be, it compels them to summon their Comprovincial Bishops to aid them in consecrating, no matter whom, bad liver, heretic, Jew, or Turk, in violation of their own most solemn vows, against it may be, their

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Applicability of the phrase "Magna Charta of Tyranny" to the statute.

(*u*) *Supra*, p. 195.

(*v*) 6 Geo. 1, c. 18; *Supra*, p. 176.

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own deep convictions and most ascertained knowledge; it bids them in prayer and solemn hymn to invoke the presence of the Holy Spirit to this monstrous profanation; in the most awful language to confer that immeasurable gift on the mocking infidel, it may be, before them, and to minister to him that rite from which on the morrow they would be bound in strictness to exclude him. And all this it bids them do, as it is said, without possibility of defence, with no plea that could be sustained in a court of justice in case of disobedience; and then strips them of the Queen's protection, forfeits their lands and tenements, goods and chattels, casts their bodies into prison for life, or during the pleasure of the Crown. As no infidel could contrive a more blasphemous mockery of religion than such a consecration would be, so it would puzzle a tyrant to invent a more cruel and disproportionate punishment. It is my consolation, and a great one it is, that I do not, and cannot so interpret the statute. I do not believe, nor shall I, until I am told so by the highest judicial authority in the land, that we have such a law under which we live. I do not believe that in any age, or under any Monarch, Lords and Commons of England would be found to pass a law with such enactments as these, under which such things could ever be possible. I cannot think that, for so many centuries, holy men should have been found, in unbroken series, content to lay on their consciences so heavy burdens. I will not admit that Henry 8 would have given the royal assent to such a law, so understood. Tyrant though he was, strongly under the influence of passion, and ardently fond of power, so blind and inconsistent is man, he certainly thought himself a Churchman, in the highest sense of the word; he gloried personally in the title of "Defender of the Faith;" and it was only two years before the statute in question was passed, that he gave his royal assent to another in which he asserted that "he and all his natural subjects, as well spiritual and temporal, been as obedient, devout, Catholic, and humble children of God and Holy Church, as any people be within any realm christened" (*w*).

The state of
things by law
existing in
Ireland and in
the Colonial
Church irrelevant.

But it was said that the construction of the statute which I deprecate in such strong language (language I meant not to be strong, but the simple statement of the ideas which it conveys makes it seem strong), only brings about in substance the same state of things as by law now exists in the realm of Ireland and in our Colonial Church. As regards the latter, the argument is wholly unfounded; the sees have been created in the Colonies, and the bishops appointed, not under any acts of the legislature, but by the exercise of the Royal Prerogative alone, and the Metropolitan is under no statutory compulsion whatever as to the consecration; it cannot be pretended that he may not exercise an entire, though of course responsible, discretion as to the performance of that rite in any given case. And as to Ireland, the argument, to have any weight, must assume the crown lawyers' construction of the statute. If consecration be not a ministerial act under the statute of Elizabeth, but the Metropolitan is at liberty to act according to his conscience, and will incur no penalties if he only refuses to consecrate where the canonical unfitness of the

appointed makes it right and proper that he should decline ; then the legal condition of the Irish branch of the Church is not in any way to be pressed as an argument against the rule ; while it is obvious on the other hand, that the revival in the same year of the statute of Henry, which gave both *congé d'elire* and confirmation, and the non-revival of the statute of Edward, which had taken them away, furnish some argument, for I do not rely on it strongly, for my interpretation.

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Upon what remains I shall say but a very few words, though it is a part of the argument very important, and as I think equally strong; I mean the form of proceeding in confirmation. Looking at the traces which may be found in the books cited, it seems to me clear that we have now effectually the same form as obtained before the Reformation; and if so, the form probably which obtained from very early ages. But the dilemma is this: either the form is thus ancient, or it obtained almost immediately after the Reformation. If the former, what weight does it not add to the whole evidence of facts down to that event? If the latter, will any one assign a plausible reason for the inventing a procedure so solemn, so judicial in all appearance, so full of religious ceremony, if the process itself were but a shadow? Will any instance be produced in history of great and grave functionaries, such as Archbishops and Bishops, setting about to contrive, or allowing to proceed, or taking part in enacting, such a ridiculous and at the same time profane mockery? I believe a parallel could not be produced.

*Form of con-
firmation indi-
cative of its
judicial cha-
racter.*

It was urged in the course of the argument that confirmation might be a substance, but that the form was immaterial; that it was merely the mode by which the Archbishop was to satisfy his own conscience of the fitness of the candidate; a mode by the way, of putting the argument somewhat destructive of other parts of it in regard to consecration. Originally, the confirmation may have been uncertain as to form, but it seems early to have grown into a certain established course of procedure, and analogies will supply themselves immediately to the minds of lawyers, drawn from what has happened in regard to many of our own legal proceedings. Those forms when established by usage become binding, and the Archbishop, even if it be a mode only of informing his own conscience, must inform it now in the mode prescribed. For he, be it always remembered, is not the only person concerned; the Bishop elect, though not originally interested in the matter, and not supposed in the first place to have any personal desire to fill the great office to which he is called, as soon as he is elected, by the agreement of all parties (indeed his interest was much pressed in the argument), comes to have a direct and certain interest; he has not only a substantial and real interest, but he clearly has an interest of which the canon law took notice; because unless he had been a party to the proceeding below, he could not have become, as he appears to have been in repeated instances, the party appellant at the Court of Rome. The Church had yet more urgent rights, and justice requires that such a proceeding as this, whether in fairness to the bishop elect or in fairness to the Church concerned, should be open and governed by certain definite forms; for all lawyers must admit that it is by

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Hen. 8, con-
firmation al-
ways and
everywhere
required.

Such confirma-
tion a judicial
act of a spirit-
ual superior.

forms in a court of law that rights are substantially protected. If, therefore, this was in the first instance a proceeding that might have assumed any form, or at first was governed by no form at all, yet if, for at least 300 years it has taken a particular shape, that shape judicial, that proceeding carried on in open court, and parties summoned to make their appearance in that place; then according to that proceeding, by that form, and in that open court, I conceive the archbishop is bound now to proceed.

It was urged again, that there was a total want of instances, since the Reformation, of the rejection of any Bishop Elect; and I would rather make that admission in the fullest terms, than stand upon any of the cases about which contest was made in the course of the argument. It does not appear to me that any one of them was made out in so satisfactory a manner as to entitle the Court to found its judgment upon it. But what is the weight of the observation, after all? That it introduces some difficulty into the case, that it gives those who oppose this rule some ground to stand upon, I admit most freely, and it is an admission that I can make with perfect safety, for I am not contending that this case is altogether free from difficulties. After all, however, set against that the mere existence of this form during the whole of that time, and consider the circumstances which may very reasonably be taken into the account, to explain why there may have been no substantial appeal made, it seems to me that that argument is not entitled to very much weight.

For all these reasons thus imperfectly expressed, not intending to pass over entirely any of the difficulties presented, and yet feeling that I have been compelled to do but little justice to some parts of this great case, it seems to me upon the whole that this Rule ought to be made absolute.

Mr. Justice PATTESON.—I do not propose to enter into a full examination of the various passages which were cited from the works of writers on the canon law as well English as foreign, from the canons of general councils held at different times in the Christian church, and from various authors, touching the subject of confirmation of Bishops, which were very properly brought before the Court in the course of the argument. They appear to me to have established satisfactorily that in all Christian countries, in England as well as others, wherever a bishop was elected, from the earliest times until the passing of stat. 25 Hen. 8, whether by the people, by the clergy and people, by the clergy as a body without the laity, or by chapters or convents, that election required to be afterwards confirmed in order to perfect it; that such confirmation was the act of some spiritual superior, and was a judicial and not a ministerial act, one which involved an inquiry into the regularity and sufficiency of the election, and into the qualifications as well as the identity of the person elected, and coming after and by way of review of the election cannot properly be said to have been part of the election itself.

Such confirmation was obviously most requisite in the case of a popular election, but it was also very important when the election was confined to a smaller body. Without the control afforded by it,

great danger would have been incurred of the introduction of very unfit persons into the said office of bishop, the mischief of which is obvious. All Christian people were interested in various degrees in preventing such mischief; and therefore when the act of confirmation was to be performed, all persons were cited generally, as well as those who had any particular interest specially, to come forward and state their objections, if they had any, to the election. Such citation appears to have been used in this country at an early period, though the precise date does not appear, and to have been in use and well known before the time of the passing of stat. 25 Hen. 8, and to have continued to be used up to the present time: whether it was introduced into this country from the canon law, or how far the canon law as to confirmation was adopted in this country, whether altogether or in part, I do not think it necessary to inquire. It is sufficient for the purpose of arriving at a true construction of stat. 25 Hen. 8, upon which this case depends, that before, and up to the time of the passing of that act, the election of a bishop in this country required to be confirmed by a spiritual superior, whether the pope or the metropolitan, who, anciently at all events, had the right; that it was a judicial act, and all persons were cited to come forward, which citation had been long in use.

Several instances of the Archbishop of Canterbury having refused to confirm elections of bishops in this country and having rejected the persons elected were cited from Wharton's *Anglia Sacra*, in which instances the objections were not merely to identity but to qualification, and the elections were annulled by the authority of the metropolitan. They were all prior to stat. 25 Hen. 8, and the elections at those times were real and free elections under a *congé d'élire* granted by the Crown, which, however, did not state who was to be elected, and was a matter of strict right as laid down according to the statutes of this realm, having been reserved only as an acknowledgment of the foundation and patronage of the Crown when the freedom of election was conceded to the chapters and other bodies. The Crown, it is said, used to recommend some person to be elected at that time, and influenced the elections; but there was no power in the Crown to compel the election of any particular person, nor any legislative enactment restraining the freedom of elections. Therefore, the annulling of any such election by the archbishop or the pope when the act of confirmation came to be performed, could not in any way trench upon the prerogative of the Crown.

The authorities from the Year Books, cited by the judges in the case of *Evans v. Ascuthe* in Palmer, page 470, show that confirmation was an essential and necessary act; so much so that a bishop elect was not so completely in his office before confirmation as to occasion an avoidance of any preferment that he had before; and the reason given is, because confirmation might be refused, and so the election vacated; and it is remarkable that the judges in that case, though they cited no authorities subsequent to the statute of Hen. 8 for the position, manifestly considered the prior authorities as applicable in this respect since that statute.

Taking it, then, to be established by the authorities cited in the

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Citation of opposers.

Instances of rejection, by the Archbp. of Cant., of persons elected, whilst elections were free.

Confirmation an essential and necessary act.

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*Statute of pro-
visors; 25
Edw. 3, c. 6,
ss. 2, 3.*

*Partial revest-
ing in the
crown of the
right of colla-
tion.*

*23 Hen. 8,
c. 20, s. 2.*

*25 Hen. 8,
c. 20.
First introduc-
tion of the
letter missive.*

course of the argument, as I think it must be, that at the time of the passing of stat. 25 Hen. 8 confirmation was a judicial act, I come to consider the provisions of that act. But first I would advert to the statute of provisors 25 Edw. 3, c. 6, ss. 2 & 3, which, reciting the mischiefs arising from the bishop of Rome reserving to his collation generally and especially as well archbishopricks, bishopricks, abbeys and priories, as all dignities and other benefices, enacts, "That the free elections of archbishops, bishops, and all other dignities, and benefices elective in England, shall be holden from henceforth in manner as they were granted by the progenitors of our said lord the king, and founded by the ancestors of other lords." And then it goes on to say, "And in case that reservation, collation, or provision be made by the court of Rome of any archbishoprick, bishoprick, dignity, or other benefice whatever in disturbance of the elections, collations, or presentations afore-named, that at the same time of the voidances that such reservations, collations, and provisions ought to take effect, our lord the king and his heirs shall have and enjoy, for that time, the collation to the archbishopricks, bishopricks, and other dignities elective which be of his advowry, such as his progenitors had before that free election was granted; since that the elections were first granted by the king's progenitors upon certain form and condition, as to demand licence of the king to choose and then after the election to have his royal assent, and not in other manner, which conditions not kept, the thing ought by reason to resort to its first nature." The effect of which seems to be, in case of such reservations by the court of Rome, to revest in the Crown the right of collation, in the same manner as before free elections were granted, but in the case only of such interference by the court of Rome, establishing in all other cases free elections.

I would also advert to stat. 23 Hen. 8, c. 20, s. 2, which enacts, "That if every person hereafter named and presented to the court of Rome by the king, or any of his heirs or successors, to be bishop of any sec or diocese within this realm hereafter," (which I apprehend to mean presented or named after free election,) "who shall be letted, deferred, or delayed at the court of Rome from any such bishoprick whereunto he shall be so presented, by means of restraint of bulls apostolick, and other things requisite to the same, or shall be denied at the court of Rome, upon convenient suit made, any manner bulls requisite for any of the causes before said, every such person so presented may be and shall be consecrated here in England by the archbishop in whose province the said bishoprick shall be, so alway that the same person shall be named and presented by the king for the time being, to the same archbishop." Nothing is said in this statute as to the precise manner and form of carrying it into effect, with respect to bishops.

Then follows the statute in question, 25 Hen. 8, c. 20. Now, that statute recites stat. 23 Hen. 8, c. 20, and in the preamble of the third section it states the fact, "Forasmuch as in the said act it is not plainly and certainly expressed in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated within this realm and in all other the king's dominions." Then that section enacts, that no recourse shall be had to the see of

Rome ; and the fourth section enacts the manner of electing a bishop in this country, and proceeds to state that the king may grant to the dean and chapter of the cathedrals a licence under the Great Seal, as of old time hath been accustomed, to proceed to election of an archbishop or bishop of the see so being void, with a letter missive containing the name of the person which they shall elect and choose ; by virtue of which licence the said dean and chapter to whom any such licence and letters missive shall be directed, shall, with all speed and celerity, in due form elect and choose the same person named in the said letters missive, to the dignity and office of the archbishoprick or bishoprick so being void, and none other ; and if they do defer or delay, "then it provides that the Crown may appoint by letters patent."

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Now here is an entirely new matter, as I apprehend, introduced into the proceeding of election, namely, the letter missive ; because, although before that time the letter missive went by way of recommendation, it is quite clear to my mind, that that letter missive need not be obeyed, and that it was a mere request ; that there was no legislative enactment by which the chapter would be compelled to obey and to act upon it. It is here introduced, and the enactment is, that the electors shall elect the person named therein, and no other. No words are added, as in other parts of the statute, that they shall elect no other "without suing or obtaining any bulls, letters, or other things from the see of Rome ;" but it is simply, and directly, and absolutely, that they shall elect the person named, and no other.

I cannot doubt that the effect of this is to destroy the freedom of elections altogether ; to render the elections as they are characterized in the repealed statute 1 Edw. 6, c. 2 (x), and in the Irish stat. 2 Eliz. c. 4 ; "in very deed no elections, but only by a writ of congé d'elire, colours, shadows, or pretences of elections, serving nevertheless to no purpose." I am citing the words of stat. of Edw. 6 and Eliz. But I do not agree with the other part of the character given in those statutes, which says, "seeming also derogatory and prejudicial to the queen's prerogative royal," that is, the statute of Elizabeth "to whom only appertaineth the collation and gift of all archbishopricks, and bishopricks, and suffragan bishops within this her highness's realm." For it is plain, that before and up to the time of the passing of the stat. 25 Hen. 8, the collation and gift of archbishopricks and bishopricks did not appertain to the Crown, but they were filled up by free election, by the laws of the realm, till that very stat. 25 Hen. 8 otherwise provided in this country, and the statute of Elizabeth otherwise provided in Ireland.

Freedom of Elections thereby destroyed.

1 Edw. 6, c. 2 ;
2 Eliz. (Ir.) c. 4.

The next steps after the election are enacted in the fifth section : "And if the said dean and chapter, or prior and convent, after such licence and letters missive to them directed, within the said twelve days do elect and choose the said person mentioned in the said letters missive, according to the request of the king's highness, his heirs or successors, thereof to be made by the said letters missive in that behalf, then their election shall stand good and effectual to all intents ; and that the person so elected, after certification made, shall be reputed and taken by the name of lord elected of the

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dignity; and then making such oath and fealty to the king, his heirs and successors, as shall be appointed for the same, the king's highness, by his letters patent under his Great Seal, shall signify the said election, if it be to the dignity of a bishop, to the archbishop, and metropolitan of the province where the see of the said bishoprick was void, requiring and commanding such archbishop to whom any such signification shall be made, to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same." Then are added these words: "Without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome, for the same in any behalf." Those words are added there; they are not added with respect to the election.

The archbishop is thus required to confirm, invest, and consecrate the bishop elect, without suing any bulls, letters, or other things from the see of Rome. But he is not required in express terms to confirm and consecrate, without any inquiry or any known and accustomed forms of proceeding. The statute is silent as to the cause and form of confirmation and consecration.

Silence of the
stat. as to cause
and form of
confirmation
and consecra-
tion.

If the statute had provided that the election should be by *cong   d'  lire*, "as of old time hath been accustomed," and had not introduced the new matter of the letter missive, I apprehend that no doubt could have been entertained but that the election would have been free, and the confirmation and consecration must have been also, "as of old time hath been accustomed," and that the confirmation would have clearly been a judicial act; so that it will be most important to consider, what is the effect of the provisions respecting the letter missive, not only on the election, but on the confirmation and consecration. Those provisions convert the election into a virtual appointment by the Crown; preserving, however, the form of election, and making it a mere form. Do they, therefore, make the confirmation also a mere form? It is contended that they do, not by reason of the words actually used respecting confirmation, but because of the words, "then their election shall stand good and effectual to all intents;" and so the refusal of confirmation cannot effect or annul the election in any way. I am not sure that such is the meaning and effect of those words; they may mean only that the election shall stand good and effectual to all intents as an election, just as it would when the election was free; subject nevertheless, to the same consequences of not being confirmed; but if the words mean more, and the election is to stand good and effectual although not confirmed, still the statute has made no provision for the case of a refusal by the archbishop to confirm, by authorizing the Crown to direct other bishops to confirm, or in any manner whatever to perfect the election, and carry it on to confirmation and consecration; and has therefore, in some sense, left it in the power of the archbishop to render the election inoperative, though perhaps at the risk of his incurring the penalties of *pr  muniere*. It is surely a much more reasonable construction of these words of the statute, taken by themselves, to hold that the legislature intended the ultimate perfection and consummation of the election

Effect of the
provisions re-
specting the
letter missive,
on the election,
confirmation,
and consecra-
tion, respec-
tively.

to depend on the confirmation, though as an election, it is made good and effectual to all intents; especially since, on refusal of the dean and chapter to elect, it is provided that the Crown shall nominate and present by letters patent, to be made to the archbishop; and that in that case the archbishop shall, with all speed and celerity, invest and consecrate the person nominated and presented by the king. No mention is made in such case of confirmation; that is, in the case of letters patent from the king. The legislature seems to have considered that confirmation was unnecessary where there had been no election, but the Crown had nominated and presented by letters patent. And this is not an oversight, as I apprehend; for in the Irish stat. 2 Eliz. c. 4, which abolishes election, even in form, altogether, and makes the appointment always by letters patent, no mention of confirmation is made from the beginning to the end of the statute.

Hence, however, arises another argument; and it is contended, that as the legislature treats confirmation as unnecessary where the Crown appoints the bishop directly and avowedly, namely, by letters patent, it never can have intended that confirmation should be necessary as a judicial act, where the Crown appoints the bishop indirectly and circuitously through the medium of a pretended election by the dean and chapter; therefore that the confirmation mentioned in the statute must be taken to be a ministerial act, and a mere form, that the form of confirmation was preserved because the form of election was; but neither was intended to be real or more than shadow.

It is difficult to see why confirmation should be necessary where the Crown appoints indirectly, if it was not considered so where the Crown appoints directly, and if it was right to omit it in the one case, why it was not right in the other. It is vain to conjecture the reasons which actuated the legislature at that time, and I do not pretend to reconcile or to account for all the provisions of this statute. Looking at the words used, I see nothing which imports that the confirmation and consecration were to be mere ministerial forms and shadows; they are both required in one and the same sentence, and in the same language. I cannot bring myself to believe that the legislature of this country could ever intend that the solemn act of consecration should be a mere form and shadow; and if not, neither can confirmation be so, for one and the same interpretation must be put on the language which is applied equally to both. As to consecration, indeed, no previous form of inquiry is stated to have been used, like that in the case of confirmation; nor am I prepared to say that any was necessary. The archbishop, where he had confirmed would have already inquired, and where after this statute (which would rarely happen, indeed, no instance has been cited in which it has ever happened) the Crown appointed by letters patent in default of election by the dean and chapter, he would in general be able to inform himself, without any public inquiry, as to the qualifications of the person nominated and presented by the Crown; and if any lawful impediment to the consecration came to his knowledge, I cannot believe that the legislature intended to force

*Regina v. The
Archbishop of
Canterbury.*

*Judgment of
Mr. Justice
Patteson.*

*Same language
applied equally
to confirmation
and consecra-
tion.*

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Before the stat., bull for confirmation would have directed a judicial act.

Form and shadow by express enactment introduced into elections only.

Penal clause unaffected by stat. 1 Eliz. c. 1, s. 32.

Semble. Penal clause applies only where something is done or omitted, in consequence of

him, knowingly and without regard to such impediment, to perform the solemn act of consecration.

The statute, as I have already observed, directs letters patent from the Crown, requiring the archbishop to confirm the election, and consecrate the person elected, without suing or obtaining any bulls, letters, or other things from Rome. The confirmation and consecration contemplated by the legislature seem, therefore, to be such, those words being added, "without obtaining any bulls," as would formerly have required to be sanctioned by bulls from Rome, and as would be directed by such bulls; and can it be doubted that the bull for confirmation would have directed a judicial act?

I am compelled in construing this act, either to suppose, without any express words to warrant that supposition, that the legislature meant to carry the form and shadow which by express enactment was introduced into elections, also into confirmation, or that it meant to require confirmation as a judicial act, such as it was before the statute, where there was a form of election, where the appointment by the Crown was through the medium of that form, although it did not require it where the appointment by the crown was direct. I cannot feel myself justified in attributing to the legislature the enactment of mere form, shadow, and pretence, beyond what the very express words compel me to do; and I feel bound to construe the words which are used according to their known and received meaning, if by so doing no contradiction or absurdity is involved; especially if such construction be, as I think it is, more reasonable, though I cannot altogether explain the reason of the distinction—as to where confirmation is required and where it is not.

It seems to me, therefore, that the archbishop is required by the fifth section to confirm the election, to use the words of the fourth section, "as of old time hath been accustomed;" that is, in a judicial course and with proper inquiry.

But the seventh section containing the penalty of *præmunire* against the dean and chapter, for not electing and signifying the same within twenty days, and against the archbishop, for not confirming and consecrating within twenty days, "or else, if any of them, or any other person or persons admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act of what nature, name, or quality soever it be to the contrary, or let of the due execution of this act," remains to be considered. I would observe first, that I do not think this clause at all affected by stat. 1 Eliz. c. 1, s. 32, which was referred to in the argument. It seems plain to me that that section in 1 Eliz. c. 1, operates only to prevent the repeal of the stat. 1 & 2 Ph. & M. c. 8, s. 40, which enacted the penalty of *præmunire* against persons attempting to disturb the grants made by Henry 8 of the lands of monasteries, and has no bearing on the present question.

It has been much doubted whether this penalty in the seventh section applies at all, except where something is done or omitted to be done, in consequence of communication with the see of Rome. As far as regards the latter part of the clause as to admitting censures and so forth, I see much reason to think that doubt not to be without

foundation ; for it is observable that all the words used are indicative of processes not used in our courts of law, but in the canon law and the ecclesiastical courts. But I do not think it necessary to determine that point ; for I think the language of that part of the section clearly applicable only to some extrinsic coercion used by another, whoever that might be, towards the dean and chapter or the archbishop, and submitted to by them, and not to the exercise of any jurisdiction or authority of their own which they might lawfully have ; and I have already stated that I think the archbishop has lawful authority and jurisdiction to act judicially, in regard to confirmation under the provisions of this act.

With regard to the earlier part of the clause, the words at first sight seem to import that the penalty is incurred absolutely, if the archbishop shall refuse and do not confirm and consecrate within twenty days ; and in argument these words were brought to bear upon the construction of the fifth clause, because it was said that a judicial inquiry could not be conducted in so short a time as twenty days in most cases, and therefore that no judicial inquiry could be intended. I do not think that the words here used necessarily lead to any such consequence.

It is observable that in the fifth section which empowers the king to send his letters patent to the archbishop requiring him to confirm and consecrate, nothing is said about the time of confirming and consecrating ; it is only said that the king shall by his letters patent signify the election to the archbishop, requiring him to confirm and consecrate (it is not even said with all speed and celerity, as it is in the case of letters patent nominating and presenting), without suing to Rome for bulls. Whether that is a mere oversight or not, I am sure I cannot tell ; but certain it is in this statute, where there has been an election by the dean and chapter, and where there are letters patent directed to be sent from the Crown requiring the archbishop to confirm, it does not say, "with all speed and celerity," or within any time ; but it goes on to say, "if the dean and chapter shall refuse, the Crown shall appoint by letters patent," rather I should say, it shall direct letters patent to the archbishop, requiring him to confirm and consecrate with all speed and celerity. The seventh section then enacts the penalty, if the archbishop shall refuse and do not confirm within twenty days. I apprehend that the true meaning is, if he shall refuse, and do not confirm within twenty days, without lawful cause. All statutes enacting penalties must be construed strictly ; and whenever a penalty is attached to the refusal to do any act, be it judicial or ministerial, I apprehend that the refusal must be without lawful cause or excuse, the proof of which may perhaps lie on the party refusing, but which being proved, would be an answer to any proceeding for the penalty. What would amount to lawful cause or excuse, in the case of the dean and chapter, it is unnecessary to inquire ; but it seems to me that in the case of the archbishop, the pendency of a judicial inquiry, if it be such, supposing I am right in saying it is a judicial inquiry, would be lawful excuse, as regards the delay beyond the twenty days, as much as illness, either of the archbishop or the bishop elect ; and a *bonâ fide* decision of the unfitness of the person elected after judicial

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communication with Rome.

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tion of the stat.
is no violation
of crown's
prerogative.

Disuse of
power of in-
quiry, since the
stat., not con-
clusive against
that power.

Opinions of
writers collect-
ed in "The
Royalty of the
Crown, &c."

inquiry, would be lawful cause, as regards an ultimate refusal to confirm. If, therefore, I am right in my construction of the other parts of the statute, and confirmation be a judicial act, I cannot see any thing in the seventh clause which should prevent its being so, or subject the archbishop to the penalty therein contained, if he proceeds *bonâ fide* in regard to that judicial act.

It is said that so to construe the statute would be in violation of the prerogative of the Crown. I cannot feel that it is so; the prerogative of the Crown remains just as it was, in regard to what is to take place after election, though by the letter missive the power of the Crown in the election itself is materially altered. The construction which I put upon the statute, does not derogate from, or diminish the prerogative of the Crown, but only does not extend it. Neither does this construction give the archbishop a veto to the appointment by the Crown; it only leaves him to exercise his spiritual duties as to confirming and consecrating in the ancient manner, and as in their very nature they ought to be exercised.

Again, it is said that no instance has occurred of refusal to confirm since the statute. That is a circumstance of considerable weight, and if the proceedings towards confirmation used before the statute had been dropped immediately after it, I should have thought that a contemporaneous exposition which would have gone very strongly to show that confirmation was intended by the statute to be a mere ministerial act; but the contrary is apparent, and that for some time after the statute upon the proceedings towards confirmation, witnesses were examined, and a regular inquiry gone into upon some occasions, although in modern times no such instances are cited. The disuse of an authority or power which any court by law has, will not destroy that authority or power, as conceded in *Ashford v. Thornton* (y).

The opinions of various writers collected in a recent pamphlet (z) were referred to in the course of the argument, by the counsel for the prosecutors of this writ. So far as they go they appear to me to afford an inference that the general notion was, that the archbishop was bound to confirm under the penalty of præmunire. In Brett on Church Government it is distinctly so put; that was one of the passages which Dr. Addams cited; and in Mason's *Vindiciæ Ecclesiæ Anglicanæ*, the answer to a supposed question what is to be done, if the king, being deceived, appoints an unfit person, is, that on representation to the king, no doubt he would appoint another, whereas it would have been a ready answer to have said the archbishop will refuse to confirm, if it had been thought by Mason that he had the power (a). If it is meant to be inferred that, from the time of the statute, the received opinion was that confirmation had become a mere form it must have been known to all the different archbishops and their vicars general, and it is difficult to understand why the proceedings at confirmation were not altered in their form, so as to suit the altered nature of the act of confirmation itself. If it was known to be a ministerial and not a judicial act, then, from

(y) 1 B. & A. 405. *Supra*, p. 392. &c." *Supra*, p. 277, et seq.
(z) "The Royalty of the Crown, (a) *Vide supra*, p. 440.

the time of the statute to this day, a solemn mockery has been knowingly gone through at every confirmation, the whole forms of which are assuredly those of a judicial and not a ministerial act. Too much stress ought not to be laid on the use of particular forms; but every one who reads the account of the proceedings on confirmation given by Bishop Gibson in his Codex, and which confessedly have been constantly used, and were used on the present occasion, cannot but see that the citations, the *summaria petitio*, the decree itself, and all the steps which I need not detail, have the appearance, at least, of a judicial and not a mere ministerial proceeding. It is difficult to believe such a continuance of mockery and deception by so many and such persons, and for such a length of time, without, as it seems to me, any assignable motive. I cannot but think, therefore, that confirmation was not altered in its nature according to received opinion, but remained as before; and that the want of exercise of the right of refusal was from the necessity of so doing not arising.

Instances are mentioned of Dr. Rundle (*b*) and Dr. Samuel Clarke (*c*) in which another course was taken to prevent their being appointed, and that was a respectful and proper course, in order to avoid the necessity of any refusal by the archbishop; and in the reigns of Charles 2 and William 3 the Crown by its own act directed that commissioners should be consulted in the choice of bishops, which would obviate any difficulties (*d*). It seems to me, therefore, that no sufficient light is afforded by the events since the statute, to show that it really was intended to have the effect of altering the nature of confirmation, which is contended for, or which would justify me in putting a different construction on that statute from that to which a consideration of the words of it has led me.

It is said that confirmation cannot be a judicial act; because the archbishop acts in it by his vicar general, whose office does not give him jurisdiction in contentious suits. I do not see that this alters the case. *Primâ facie* confirmation would not be contentious, and therefore the vicar general would be a proper officer by whom the archbishop might act; but it does not follow that, if the proceedings became contentious, the archbishop would be deprived of his authority, because of the usual nature of the office of the person by whom he is acting; that office is described in Oughton's Prolegomena, xvi, which was referred to by one of the learned counsel (*e*); the words are remarkable because he says, "Ea quæ contentiosæ jurisdictionis erant non exercebat, id est causarum inter partes in foro contradictorio decisionem." And then it is put in a parenthesis "*Præterquam ea quæ pro formâ solummodo ventilantur, utpote negotia confirmationis episcoporum electionis, et similia,*" then after that parenthesis, "*Sed ea quæ sunt officii meri gerebat.*" This very passage, to my mind, conveys the idea that confirmation is not officii meri, namely, ministerial, but in its nature judicial, though usually pro formâ. Neither can I doubt, that if the archbishop be acting judicially in the matter of confirmation, he would have the same

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Instances of Dr. Rundle, and Dr. Saml. Clarke.

Commissions issued by Charles 2 and William 3, for investigating fitness of proposed bishops.

Reference to the non-contentious jurisdiction of the vicar general.

Oughton.

Power of the archbishop, acting judicially, to compel attendance of witnesses.

(*b*) *Supra*, pp. 299, 393.

(*c*) *Supra*, p. 299.

(*d*) *Supra*, p. 391.

(*e*) *Supra*, p. 224.

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gue's case, in
Godwin.

power of compelling the attendance of witnesses that any other court of ecclesiastical jurisdiction has; I do not lay stress on Dr. Rives's supposed opinion in the case of Bishop Mountague, opposed as it appears to be, if it were given, by the opinion of Sir James Marriot, which was handed up (*f*); but the facts which then occurred, militate against the supposition that the citation of opposers at confirmation was generally known to be a mere shadow, and so do the observations of the judges in *Evans v. Ascuithe*, to which I have already adverted.

There is a passage in Bishop Godwin's work, which was also referred to in the course of the argument (*g*), and which seems to throw some light upon this subject, in his work, *De Præsulibus Angliæ*. In the *Life of Mountague*, at page 443, he says, "Illud autem memorabile accidit eo die quo in Ecclesiâ Beatæ Mariæ de Arcubus juxta solennem citationis formulam episcopi jam jam confirmandi mores laicorum quoque examini subjiuntur adfuisse, qui eum Arminianismi nescio cujus reum et adeo Pontificiis faventem accusarent, eâque de causâ episcopatu prorsus indignum rejicerint. Verum cum calumnias potius quam argumenta proferri viderentur, subsecuta est aliquandiu impedita confirmatio." This passage seems to treat the citation as a real, not a mock proceeding. It appears to me also that what occurred in the case of *Bishop Mountague* must have drawn much attention to the proceedings upon confirmation; and that the citation would have been then discontinued if it had been thought to be a mere mockery, and that the archbishop could lawfully omit it, much more if, as is now contended, he was precluded by the statute of Henry 8 from giving any effect to it, and indeed from making any inquiry. It is not as if no such question had ever arisen; but when it did arise in the case of *Bishop Mountague*, I cannot account for the continuance of the citation afterwards, if it was considered really to mean nothing at all.

Stat. 3 Hen. 5,
and writs under
it.

In the course of the argument a statute of Henry 5 was cited from the rolls of parliament (*h*), which is not found in the common collection of the statutes, and which, after stating the schisms and disputes respecting the election of the pope, and that in truth the apostolical see was void, describes the mischief in this country from the inability of persons who were elected bishops to obtain confirmation, and enacts that whilst the apostolical see is void, the archbishop shall confirm the persons so elected bishops, so as the king assents; and it provides for the king's writ to them for that purpose, which is nearly, if not entirely, in the same form as that directed by stat. 25 Hen. 8, requiring it to be done with celerity, and that the archbishop should do all things canonically necessary. The writ is to be found in Rymer's *Fœdera*, and proceedings under the statute are to be found in Wharton's *Anglia Sacra* as to the consecration of a bishop of Norwich in 1416, at which all opposers were cited in the usual way (*i*). It is true that there are no penalties in the statute of Henry 5, but it directs the archbishop in quite as positive terms as the statute of Henry 8; and yet confirmation

(*f*) *Supra*, p. 145.

(*g*) *Supra*, p. 296.

(*h*) *Supra*, p. 350.

(*i*) *Supra*, pp. 351, 362.

under it was plainly conducted as a judicial act and according to canonical forms.

If, then, confirmation be still a judicial act, the next question is, who are entitled to interfere and to claim to be heard in the course of the proceedings. Now, the words of the citation used since stat. 25 Hen. 8 are in themselves clear as to this point. It cites all opposers, any persons who may think proper to come forward, and they shall be heard, and this citation is stuck up in the church before the day fixed for confirmation, and is proclaimed also at the time of the confirmation. Whether this form of citation was in use before the statute of Henry 8 I believe does not distinctly appear; but if it was, the continuing of it is strong evidence to show that confirmation was treated after the statute as a judicial act, and if it was not in use before the statute, the making and introducing of it afterwards is perhaps still stronger evidence to the same effect. But that some citation to the same effect was always used in this country and under the canon law is, I think, clearly established. And it seems to me that I am not justified in saying that it was always a mere delusory form, though no particular instances are shown of opposers actually coming forward and being either received or rejected. Bishop Fell, however, in his work published in 1669, speaking of confirmation (I think the passage was cited in the argument), says, "Nemine comparente quod tamen non semper evenit" (*j*). Now it seems difficult to say that the vicar general after such a citation could be justified in refusing to allow any person who came forward with objections by way of opposition in proper form, to appear to offer their objections, unless he was precluded from doing so by the statute. If the ordinary and accustomed mode of proceeding was to make such citation *bonâ fide*, the archbishop or the vicar general could not of his own authority alter the mode of proceeding, any more than this court could refuse the wager of battle, whilst it by law existed, although the permitting all persons to appear and object under that citation may be very inconvenient and even mischievous. I would by no means be understood as expressing any approbation of such a mode of objecting in the present state of society, but the only question is, whether by law the persons had a right so to do. Nor did the vicar general act on any such supposed view, as I understand, but he refused to allow the objectors to appear at all, holding that the statute in effect took away any power or authority in the archbishop or his vicar general to hear any objections whatever. In this, as at present advised, I am of opinion that he misconstrued the statute, and declined a jurisdiction which he had by law, and therefore which he was bound by law to exercise, and as all persons were cited to appear, all those who offered to appear and were not allowed to do so, and certainly and more particularly two of them who are beneficed clergymen in the diocese of the bishop elect, are aggrieved by such refusal, and ought to have some remedy.

Is then the writ of mandamus the proper remedy? No other is shown, I should doubt very much there being any appeal from the archbishop in a matter of confirmation, under any circumstances.

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As to who are entitled to be heard.

Form of citation of opposers.

Bishop Fell.

Questionable whether any appeal from the archbishop in a matter of confirmation.

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Declining jurisdiction a ground for interfering by mandamus.

Rex v. Justices of Kent.

Bp. of St. David's v. Lucy.

Rex v. Justices of Kesteven.

Rex v. Justices of Carnarvonshire.

Reg. v. Justices of Cumberland.

The learned counsel Dr. Addams said, that there would be an appeal if persons had appeared and had been refused (*k*). I do not know of any such instance having occurred, and as at present advised, I should doubt very much whether there would be an appeal under any circumstances, but where a party has not been allowed to appear in court at all, he cannot be in a situation to appeal. It was said he could, but I do not see how it is possible that he could.

Again, here is a declining of jurisdiction by misconstruction of an act of parliament, in which case a mandamus was held to lie in *Rex v. Justices of Kent* (*l*). That was the case of a person who applied to the court of sessions to do that under an act of parliament, which they thought the act did not authorize them to do, and so they refused to act, and the mandamus was granted to put them in motion, but not directing them how to decide. Here the parties applied to oppose that which, but for the statute of Henry 8, they would undoubtedly have been entitled to oppose; they are refused on a wrong construction of the statute, and the thing which they were entitled to oppose is done. The principle is the same, though the facts are different. It is the misconstruction of the statute and the declining to exercise jurisdiction which belonged to the court, which will render the confirmation void, if it be void, and not merely an erroneous decision as to admitting allegations, as in *Bishop of St. David's v. Lucy* (*m*), or wrongly admitting or rejecting evidence, or any other wrong conclusion, if there has been a hearing; for in such cases this court is not a court of error and does not interfere. *The Queen v. the Parts of Kesteven* (*n*). However Mr. Justice Holroyd, in the case of *Rex v. Justices of Carnarvonshire* (*o*), intimated that if the court of sessions had heard one side and altogether refused to hear the other, he should have thought it the same as if the case had not been heard at all, and that the mandamus ought to issue, though the sessions had come to a decision. Also in *Regina v. Justices of Cumberland* (*p*), where a complaint was made by an overseer against a man for not maintaining his wife, the man denied her to be his wife, and produced receipts for money paid by him to the overseer, in which the woman was treated as not his wife, on which the overseer offered to prove a marriage between the man and woman at Gretna Green, but the justices refused to receive it, and dismissed the complaint, this court granted a mandamus.

These cases are not precisely in point, nor were any cited that are so, either on one side or the other, with respect to mandamus. That of the *Bishop of Saint David's v. Lucy* is plainly not in point; for there both parties were before the Court, and the question was, as to admitting certain allegations, a matter which the Court of King's Bench could not determine upon or interfere with. Here the parties are not allowed even to appear, and that on the misconstruction of an act of parliament.

(*k*) *Supra*, p. 305.

(*l*) 14 East, 395. *Supra*, p. 117.

(*m*) 1 Lord Raym. 544. *Supra*, pp. 209, 254, 305, 311, 316, 330.

(*n*) 3 Q. B. Rep. 810. *Supra*, p. 158.

(*o*) 4 B. & A. 88.

(*p*) 4 Ad. & Ell. 695.

If, indeed, by the known practice at confirmations at all times before and since the statute, independent of the supposed effect of stat. 25 Hen. 8, the citation of opposers in whatever form couched, was always a mere idle ceremony, meaning nothing, and not intended to be acted on by those who made it, like the challenge of the champion at the coronation, which was alluded to in the argument (*q*), and the vicar general had rejected the parties applying to be heard on that ground, the case might have come within the authority of *ex parte Smyth* (*r*), also cited in the argument. But if I understand the affidavits rightly, it was not so put by the vicar general, but his rejection proceeded on the construction of the statute. I think, therefore, as at present advised, upon the principle acted on in cases of mandamus, that this confirmation cannot be held good, and that a writ of mandamus may and ought to issue.

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Ex parte Smyth.

A question was brought before the Court, as to the effect of the Church Discipline Act (*s*) which limits prosecution to two years, and directs the mode of proceeding. Had this been an attempt to prosecute the bishop elect for some supposed offence committed more than two years ago, in a way not authorized by that act, of course it could not have been maintained; but this is nothing of the sort. It is an application to be allowed to appear and be heard according to the citation proclaimed by the vicar general, not by way of prosecution against the bishop elect, but to show that he is not entitled to be confirmed in that election, on account of some supposed objections. I do not see, therefore, that the Church Discipline Act touches the question at all.

Church Discipline Act does not touch the question.

In coming to the conclusion at which I have arrived, I have entertained very great and serious doubts, and my mind has fluctuated, during the argument and since, very much, and more particularly with regard to the power of this Court to grant the writ of mandamus under the circumstances, and I cannot but feel very diffident in my opinion, considering that my lord and my brother Erle take so entirely different a view of the subject. I think it is admitted on all hands, to be one of very great importance and difficulty, and for that reason very fit, as it appears to me, to be put into such a shape as to enable the unsuccessful party here to take the opinion of a court of error. The power of bringing a writ of error having been granted by a recent act (*t*), has materially affected the duty of this Court, as it seems to me, in regard to writs of mandamus. Formerly, when the decision of this Court was final, if the facts were not disputed, and the law was fully argued on the motion for the writ, no advantage was gained by delaying the decision upon that law until a writ had issued and a return been made; but now by refusing the writ, we prevent the party applying for it, from having the benefit of the recent statute, whereas if we grant it, the other party has still that benefit, and therefore, as I think, we ought now to grant the writ as a general rule, unless we are quite clear that it cannot be sustained.

Duty of the court in granting mandamus materially affected by 6 & 7 Vict. c. 67.

I am fully aware of the agitation of men's minds, and of the

Inconvenience of prolonging the agitation of the present question.

(*q*) *Supra*, p. 148.

106, 123, 154, 228, 230, 422.

(*r*) *Supra*, p. 160.

(*t*) 6 & 7 Vict. c. 67.

(*s*) 3 & 4 Vict. c. 86. *Supra*, pp.

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Nature of the proposed objections, immaterial to be now considered.

strong feelings which are said to attend this case, and doubt not that much inconvenience would accrue from the ultimate decision of it being delayed ; but I do not see that those are sufficient reasons for not putting the case into such a shape that recourse might be had to a court of error. It may be that that opinion as to our duty in respect to the writ of mandamus, may have influenced my mind somewhat in coming to the conclusion I have come to.

I have not alluded, in the course of my observations, to that part of the affidavit, which discloses the nature of the objections intended to have been urged by the prosecutors of this writ. I do not think it at all necessary to do so. I consider the miscarriage to have been in refusing to allow the parties to appear and bring forward their objections, whatever they might be, which is wholly beside the question as to the nature of these objections. Upon them it would have been the duty of the archbishop or his vicar general to have determined, and this Court would not attempt to interfere with that determination. The present question must be, as I think, wholly independent of who the person is who has been elected bishop, and what is the sort of objections intended to be urged against him. It is a question applicable to every case of confirmation of a bishop as well as this.

Upon the whole, though with the most unfeigned diffidence, I am of opinion that this rule for a mandamus ought to be made absolute.

Judgment of Lord Denman.

Lord DENMAN.—This is an application for a mandamus to the archbishop of Canterbury and his vicar general, to hear certain reverend gentlemen, who appeared and claimed to be heard as opposers of the confirmation of the bishop elect of Hereford. Their affidavit states in substance that a citation was issued requiring all opposers to appear; that they did appear accordingly with their objections, and attended by counsel; and that their counsel were not permitted to do more than argue in favour of their right to be heard; after which, the vicar general proceeded with the confirmation, and declared that no opposers appeared, and pronounced all opposers contumacious for not appearing. They add, that the opposition intended was founded on two books, written, printed, and published by the bishop elect, repugnant to the articles of Religion; and they contend, that the confirmation which followed is, on this account, and by reason of this refusal, wholly null and void.

Mandamus not to be lightly refused.

Various arguments were urged to prove that a mandamus would not lie in this case, even though some wrong were done. I am clearly of the contrary opinion; and, even if I doubted of this, I should think it better to issue the writ, reserving the question of its validity, than by refusing it to run the risk of abridging the queen's just prerogative, exercised by her in this Court, to insure the enjoyment of her rights in other Courts and on other occasions,—a prerogative not only important to the dignity and power of the Crown, but become necessary, particularly of late years, to enable her subjects to enforce their claims against each other.

But I advisedly abstain from discussing these several objections. I might fully excuse myself from doing so, after the very able argu-

ment of my brother Patteson, in which I entirely agree upon this point; and also, because my judgment proceeds upon other points, to which, therefore, I will now direct my attention.

Furthermore, I am of opinion that there is a *primâ facie* case of wrong; the previous citation for opposers to appear at a confirmation, and the proclamation at the time to the same effect, furnish to my mind some evidence that opposers had a lawful right to appear and be heard to make their objections; and when opposers come, and are eager to state their objections, to stop their mouth at the very outset of the ceremony, and close the door of the Court upon them, is a practice reflecting no honour on the wisdom of those who framed it. The absurdity of these particulars can only be exceeded by the sentence of contumacy with which they close, solemnly pronounced on those who appear and press for an hearing, for their default in not appearing. This anomaly, however, has been deliberately gone through, and is distinctly avowed by persons entitled to our highest respect and almost unbounded confidence, by the venerable primate of the realm, a bishop during a quarter of a century,—an archbishop during much the greater part of that period,—who must have taken a leading part in the confirmation of almost all the reverend prelates who now adorn the bench,—one who, in trying times, has uniformly displayed, among higher qualities, the utmost prudence and moderation and care; his fine mind and highly cultivated understanding not impaired by age, but matured by experience and reflection. The act complained of has proceeded upon the sanction and approval of persons most eminent in the law, and most conversant in these particulars, who were his grace's immediate agents in excluding the complainants; and all these persons justify what they have done not by any attempt to show that it is consistent with justice, reason, or propriety, for, on the contrary, they lament the continued adherence to a form which they admit to be strange and scandalous; but they rely on an express enactment of the law of the land, the statute passed in the 25th Henry 8, which stated, that it had not before been plainly and certainly expressed in what manner and fashion archbishops and bishops should be elected, presented, invested, and consecrated within the king's dominions; and proceeded then fully to prescribe all the particulars by which a bishop was to be thereafter made.

The first step in this process, on the avoidance of a see, is the *Congé d'Elire*, accompanied by the Letter Missive, so often explained—then the form of election—then the certification of it, under the seal of the chapter, to the king, whereupon “he shall be taken and reputed by the name of lord elected of the said dignity;” then after the oath of fealty taken, “the king's highness, by his letters patent, shall signify the election to the archbishop, requiring and commanding such archbishop to confirm the said election,” not to confirm it as of old time, not to follow any form of confirmation which had been practised up to that period, whatever that might be, but the command is “to confirm the said election, and to invest and consecrate the person so elected to the office and dignity that he is elected unto:” upon which enactment the first observation that

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Primâ facie case of wrong. Anomalous character of the proceedings at confirmation.

Steps in the process of making a bishop, as prescribed by stat. 25 Hen. 8, c. 20.

Silence of the stat. as to form of confirmation.

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Omission of
confirmation
from stat. 23
Hen. 8, c. 20.

Direct nomina-
tion in case of
refusal to elect.

Stat. 1 Ed. 6,
c. 2.

Revival of stat.
25 Hen. 8
under Eliza-
beth, implied
no respect for
the principle of
confirmation.

Spirit in which
the stat. was
framed: jea-
lousy of inter-
ference,
whether from
Rome, or from
the Anglican
Church.

occurs to me is, that no particular form of confirmation is given, no reference is made to any antecedent practice.

Reference is next made to the statute of 23 Henry 8, (cited in this statute of the 25th,) entitled "An act for restraining the payment of annates to the see of Rome," but extended far beyond that object: for, after denouncing the former exactions of the pope, as the means of delaying appointments made by the king, it enacted, that if any person hereafter named, and presented to the court of Rome, shall be there letten, deferred, or delayed from such bishoprick, or shall be denied the requisite bulls, "such person shall be consecrated here in England by the archbishop in whose province the said bishoprick shall be: so alway that the same person shall be named and presented by the king for the time being to the same archbishop;" being so named and presented, consecrated and invested, he shall be deemed and taken to be and obeyed as a bishop. The word "confirm" never once occurs in this statute which was in force and is kept alive by the 25th Henry 8, so that any person delayed by Rome from his appointment to a bishoprick, and afterwards named and presented by the king to the archbishop, is not thereby required to be confirmed at all, but must be consecrated on the king's sole nomination and presentation.

Another provision of 25th Henry 8, was pressed as material to show that confirmation was intended to be ministerial only. If the dean and chapter refused to elect for twelve days the nomination was in that case given to the king, without any necessity for confirmation.

To prove the notions prevailing about this time on the same subject, we were also referred to the act of Edward 6, which recited, with much disapprobation, the mock election under Congé d'Elire and Letter Missive, stigmatizing those proceedings as "colours, shadows, and pretences serving to no purpose, and seeming derogatory and prejudicial" (and, with deference to my learned brother, I must say they do so seem, if the queen had that power notwithstanding that election) "to the king's prerogative, to whom only appertaineth the collation and gift of all bishopricks in England and Ireland," and gave the appointment to the Crown by letters patent. This act of Edward 6, was indeed repealed, and so was the 25th Henry 8, in the reign of Philip and Mary. 25th Henry 8 was revived in the reign of Queen Elizabeth; but this (it was said) could not have been from respect to the principle of confirmation, because in her reign the nomination to all the bishops of Ireland by letters patent was vested in the Crown, and for them no confirmation was required.

The statute in question was undoubtedly framed in that spirit of jealousy towards Rome which was severing one by one all the ties between this kingdom and that see. But neither King Henry 8 nor any other king was likely to leave the "manner and fashion of making bishops," when he once set himself about it, imperfect for the time to come, when that was one of the professed objects of the statute, put forth in the preamble of the 7th section. And it was asked, whether such a king, in particular, was likely at the same

moment to deprive the Pope of his veto and lodge it in the hands of one of his own subjects (*t*)? The only answer to this pertinent question, if I understand it properly, I confess I could not hear without surprise and regret. As I caught it, it was a reflection, and a severe reflection, on that great father of the English Protestant Church, Archbishop Cranmer. I understood the solution of the difficulty to be, that "The King knew how obsequious an archbishop he had in Cranmer, who would readily conform to any wish that the royal mind might conceive (*u*). Cranmer was not a blameless man, very far from it." Shortly before his death he betrayed a lamentable want of firmness,—not, however, greater than his, who was selected from among the apostles as the rock on which the everlasting church was to be built. Yet his noble bearing, when he met at last the death he had too much feared, might have been expected to protect his memory from general reflections like these. In a court of law: "In quæstione legitimâ, in judicio publico, cum res agatur apud iudices, tanto conventu hominum ac frequentiâ, hoc uti genere dicendi, quod non modo a iudiciorum consuetudine, verum etiam, a forensi, sermone abhorreat," seemed a remarkable use of the opportunity afforded. In the presence of so many learned and faithful sons of the Church of England, I certainly did not expect to hear the name of Cranmer introduced only for such a purpose. I should have observed this, of course, not for the sake of any personal observation upon the very learned gentleman who uttered this sentence; but I do think that it shows an excitement of mind existing somewhere upon the present subject, whether in the client or the counsel, which makes it doubly our duty to take care that we are not led away by the impressions on their minds, or too ready to yield to that ecclesiastical authority which, in my opinion, justly and wisely, it has been the duty and the boast of this court, in all ages, to watch with peculiar jealousy.

If Henry reckoned upon Cranmer as a mean and servile churchman, who would always yield to his caprices, he assuredly mistook his man. The archbishop more than once thwarted the inclination of his sovereign. When Anne Boleyn's fate was sealed, "Cranmer alone," (says Hume,) "of all the queen's adherents, still retained his friendship for her, and, as far as the king's impetuosity permitted him, he endeavoured to moderate the violent prejudices entertained against her,"—his long letter of remonstrance is preserved by Burnet, and probably no surer method could have been found for exasperating a selfish monarch than to protect the queen in her prosecution. Again: I would mention, that afterwards, in 1539, when the six articles were drawn up by a committee of the privy council appointed by the king, they met with Cranmer's vigorous opposition. When they were afterwards brought into the House of Lords, there also he spoke against them, declining to obey the king's injunction to absent himself, and this at a time when the royal mind was bent on the extirpation of all doctrines differing from his own, by torture and death.

But taking that expression in its milder sense, as only stating the

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Cranmer.

(*t*) Vide *supra*, pp. 208, 246, 383.

(*u*) *Supra*, p. 360.

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king's hope that Cranmer would be willing to listen to his suggestion, Cranmer was not immortal, and other less friendly or less tractable metropolitans might succeed him. Henry 8 knew the strength and obstinacy of religious faith from his own experience, having seen one of the most upright and virtuous of men, lately his own well-beloved chancellor, lay his head on the block, rather than admit his supremacy. He had seen the power of eminent ecclesiastics both at home and abroad—he could not be ignorant of the past, but was probably as well acquainted with the time of Henry 2 and Thomas à Becket, as with any other chapter of English history. "Why, with full means of securing his own complete control over so capital a part of his government as the making of bishops, he should leave it in any degree to hazard, no ingenuity can discover a reason. And besides, the parliament itself, at its meeting, had expressed their discontent with the clergy, and especially had complained of the archbishops' courts, which they could feel no temptation to invest with any new jurisdiction.

*Confirmation
in the stat.
closely con-
nected with
election.*

These considerations are surely entitled to great weight, the whole argument on the other side resting on the single word "*confirm*" found in the statute. It does not, however, stand singly, but is joined with election, "shall confirm the said election," and these words plainly and more naturally describe a duty connected with an election necessary to be performed by somebody which appears originally to have devolved on the metropolitan.

*Office of the
metropolitan at
confirmation.*

In the times when the election was real, two things required to be certified to the high functionary who had to confirm it, not having been then and there present:—first, that the election was duly made; secondly, the identity of the person who brought the certificate. The office of ascertaining these matters was, perhaps, scarcely befitting the dignity of the archbishop, if that had been all; but his presence, his benediction, his gracious reception of his new colleague in the sight of the people, tended to secure their respect and obedience. Those who maintain this rule say that he had much more to do, to hold a Court for summoning accusers from every quarter, and for hearing every kind of objection to the eligibility of the lord bishop elect; and the question is not whether he had authority to confirm or not, and to exercise some discretion, but whether he was bound to open a court of this description for the purpose first described: such is the duty now sought to be imposed on the Archbishop of Canterbury. I would ask, is there any necessity for this? That person was formerly ordained a deacon, more lately a priest, the whole world were called upon at those two several periods to pronounce whether they suspected him of any great crime or offence; if they did on his first ordination that was delayed until he was clear of the charge. The same process was again gone through when he was made a priest. All might come to make particular accusations if they thought proper, of any great crime or offence, and then that was cleared or the ordination could not proceed. This person then has already twice undergone, every bishop has undergone this ordeal, and the ordaining bishop was twice enabled to institute all needful inquiries into his life and conversation. But the deacon has become a priest, and the priest become now the lord bishop elect, bearing the additional

*Inquiry then
into party's
fitness super-
fluous, and
unreasonable.*

testimony of the election itself, by parties competent to judge of his fitness in all respects, or since that statute he brings his nomination by the Crown. Is that to pass for nothing as a testimonial? Why is the archbishop to suspect and to commence any inquiry, and much more, why is he to call upon all mankind to question the confirmation? If the election were in the people at large, every one voting according to his opinion of the candidate, no instance occurs of such a court of accusation being held. But here the election had passed away from the people, and vested for ages in the dean and chapter, who have presented the bishop elect for confirmation, under the express recommendation of the Crown.

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The limitation of time imposed by the statute, on the two great processes of election and consecration, seem to afford material support to this view. The election must be made in twelve days: if not, the king may nominate. The archbishop is enjoined to consecrate in twenty days, which would suffice for the preparation and transmission of documents from the more distant parts of the country.

Limitation of time for election and consecration respectively.

Again, the election is reduced to a mere form, the appointment being both virtually and in terms to be made by the king. The consecration wears a more solemn aspect; the Book of Common Prayer prescribes the impressive forms with awful sanctions. The bishop when elected and his election confirmed before receiving Episcopal ordination, is to be called, tried, and examined, and the archbishop, after receiving him at the hands of two bishops, demands the king's mandate for his consecration. Certain oaths follow, then the litany, "then the archbishop sitting in his chair," shall put certain fixed questions to him that is to be consecrated, and to those fixed answers are to be given by him. The thirty-sixth of the Articles of Religion declares expressly that the consecration shall be in that form, which shall be deemed perfect, and according to the law of God. The consecration therefore is said to be, like the election, little more than nominal; the one initiated by the dean and chapter, and the other consummated by the archbishop, but both in reality the acts of the king; and if this be so, we are asked to discover some reason why the confirmation should be more real than these.

Consecration.

The answer attempted is that the word "confirm" had a known legal meaning in the time of Henry 8, and was used by the Legislature in its legal sense. After remarking that though it might bear that sense, it did not bear it to the exclusion of any other, I will proceed, however, to inquire what was at that time the meaning of confirmation by the archbishop, and whether the gentlemen who come forward and contend that confirmation was understood to mean the power of holding a Court, with the duty of summoning all persons to come in and oppose the confirmation of the bishop elect, are right in so contending. The favour of his sovereign is supposed to place the lord bishop elect in no position analogous to any thing I am aware of but that of a felon, upon whose trial the jury is charged; he has pleaded "not guilty," and forthwith all persons are invited by public proclamation, if they know of any treasons, murders, felonies, or other misdemeanors done or committed by the prisoner, to come forward and give their evidence.

Meaning attributed by the opposers to the word "confirm."

Position in which, according to them, the bishop elect is placed.

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Canon law of
no authority in
England, un-
less acted
upon.

The practice
of opposition at
confirmation
has never exist-
ed authorita-
tively in
England.

Consequences
of permitting
opposition.

In that situation the bishop is placed by the favour of the Crown. The black catalogue of treasons, murders, felonies, and misdemeanors is made darker and more ominous by that word which has crowded with crimes the records of mankind, the fatal and comprehensive description, heresy.

When engaged on this general subject, I think it necessary to re-assert what has so often been declared by our illustrious predecessors in this Court, and by the greatest writers on the English Constitution, that the canon law forms no part of the law of England, unless it has been brought into use and acted upon in this country. Hence, rather differing from what I have heard to-day, I am of opinion that the burden of proof rests on those who affirm the adoption of any portion of it in England. I thought of stating that, merely by way of protest, because some things were said at the bar which seemed to question so important a position. But I do not dwell upon it, not wanting that principle here, inasmuch as I am fully convinced that this practice has never existed at all authoritatively in this country, and for this I mainly rely on the arguments of those learned gentlemen who have supported the present motion; they have satisfied me that no such opposer ever has been heard on any such occasion: this fact I draw, not from affidavits or documents, but the total absence of all affirmative proof of a proceeding extraordinary, so striking, and so affecting, that if it ever took place it must have been notorious, proves to me that it never took place; there is not, in my opinion, a trace of such proof; all records, historical and legal, present a perfect blank to our investigation of this subject. It was thrown out on the motion that such opposition had never been necessary before, as if none suspected of unsound doctrine had ever been raised to the Episcopal office. What? During all the centuries that Christianity has flourished in this country, not one infected with heretical opinions or *bonâ fide* thought to be so tainted? Was there in those dark ages no spirit of persecution, no spiritual pride? But supposing all to have been orthodox and universally admitted to be so, has no one ever been promoted whose piety and morals were not wholly above all exception? And even assuming this, were there none capable of preferring a false charge? Was envy dead, was faction banished from the world? Where were the sons of Belial at that time? We know that the family is not extinct even now, and there never could be a field in which they could act with so much delight.

Observe what would happen, "come forth and oppose the confirmation of the bishop elect," such is the invitation of the public officer to the whole people, first pronounced in the church, afterwards ejaculated at the door. An answer would surely have been heard in some quarter, "Here am I to tell you that I remember the bishop elect at college some twenty years ago, and I recollect some irregularities of conduct which in my judgment unfit him for a bishop." A second says, "He is justly suspected by me of having but recently performed the church service in a state of ebriety." The changes may be rung on all those offences or defects which are blemishes to the Episcopal character, all from which the Pharisee blessed God that he was himself exempt. His mother's chastity may

be impeached, or his own ill management of his son. The archbishop may deem the charges frivolous, or may know them to be false; he may think that they have been atoned for by a long life of piety and virtue, or he may know the accusers to be infamous and malignant, and utterly unworthy of belief. This, however, does not alter his duty; the inquiry must proceed, and whatever the result, even if the confirmation is delayed but a day, some taint of calumny may remain. But before these articles are well committed to writing comes the unfathomable charge of heresy, to be proved by extracts from books, or reports of conversations in their nature difficult to understand, remember, and report, and defying the most innocent man to answer them without the comparison of other passages, and the explanation that may take out the sting. If no other effect results, he must be a clumsy accuser who could not prolong the debate, so that the confirmation might be "letten deferred and delayed" till the natural life of all concerned is closed, the see in the mean time remaining without a bishop, and the archbishop's whole time having been diverted from his high duties to this absorbing investigation.

The existence of this court being inferred, we are next to infer what its proceeding must be: this we derive from the citation of opposers, from the formula used in confirmation, and from the *schedula prima* exhibited by the proctor to the dean and chapter, who prays that their election be confirmed. This *schedula* is thus described by Bishop Gibson, in a note to the statute 25th Henry 8, correctly copied by Mr. Stephens, in his useful work on Ecclesiastical and Eleemosynary Statutes. "It exhibits the citation and return, prays that the opposers (if any be) not appearing may be pronounced contumacious, and precluded from further opposition; and that the confirmation may be proceeded in, which is accordingly done by this schedule." A *summaria petitio* is then presented by the same proctor, setting forth, among other things, the fitness of the person elected. A "*schedula secunda* before sentence, a second præconization of the oppositores, if any be, is made *ad fores externas ecclesie*, and none appearing, they are declared contumacious by a second schedule." In this court of confirmation then, which is turned by the argument into a court of opposition, it is absolutely taken for granted that no opposers will appear, and if they do, no provision is made for their being heard, nor for what shall be done if they are heard; in truth, the non-appearance of opposers is as much a part of the proceeding as any other part of it, though the absurd form of pronouncing them contumacious is still preserved, perhaps through the jealousy of all change which has so often obstructed improvement, perhaps from another difficulty generally found in the way of reformation, because certain emoluments were earned by these idle ceremonies in each of their ten stages.

The evidence then that this opposition actually took place in the most ancient times, is the very same as that which would prove its existence during the last three centuries, the fact of the proclamation made. But we know the contrary of this. In point of fact it has been mere matter of form during the whole of the latter period, why not of the former? When the inadequacy must have always been

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Non-appearance of opposers a necessary part of the form of confirmation.

No sufficient evidence to show the right of opposition even in ancient times.

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as palpable as the iniquity of a proceeding, which would have no certain results but uncharitable feelings and permanent disquiet in the church, why may not the ecclesiastical authorities themselves, even in the most ancient times, have the credit of tacitly surrendering so invidious and dangerous a power, or rather of refusing to adopt it?

I will not say that any attempt to carry this supposed law into effect must have shown its impracticability and insured its rejection; but such a consequence is highly probable, and will best account for its non-appearance in the books.

Court of Au-
dience.

Coke: 4 Inst.

But let us consider what a mighty edifice is sought to be raised on this naked word "confirm," a court for the trial of unknown accusations, a judicial authority with process and practice of its own, the power of summoning and compelling witnesses, of securing respect to itself, and enforcing its orders and decrees. We are told that the archbishop has already a court so endowed, the court of audience, which appears in Lord Coke's enumeration in his 4th Institute, who never imagined, however, that it enjoyed those functions; yet all admit that this court is possessed of no contentious jurisdiction whatever; the vicar general presides there, but he is no necessary party to attend the confirmation of a bishop's election.

That this Court has ever done what the archbishop is now required to do, no one has pretended.

Absence of the
practice since
time of Hen. 8.

Bp. Mounta-
gue's case.

That the appointment of bishops is vested exclusively in the Crown, since the time of Henry 8, has been an universal opinion: that any opposer ever appeared, there is not even the shadow of a surmise. The records of the court of audience, and of all other ecclesiastical courts, are silent as to any attempt of the kind, with a single exception, to which I now advert. In 1628, Bishop Mountague was presented for confirmation; according to custom, opposers were challenged, and contrary to custom an opposer claimed to be heard. He accused him of personal unfitness on account of the bishop's theological opinions. The vicar general, Dr. Rives, is reported to have refused him a hearing, but he is said to have grounded his refusal solely on the fact that the charge was not written, and then to have added that if it had been written, he would have received it. The report is loose and unauthenticated. But, if literally true, to what does it amount? Of Dr. Rives we know but little, and that not much to his credit; but that which is said to be the law under circumstances not requiring judicial consideration is of little value. We have reason every day to repudiate the claim to make law by these *obiter dicta*. To me, however, it is tolerably clear that Dr. Rives was wrong, if the law is as the prosecutors of this rule suppose: nothing is said in that law about writing: the opposers might be unable to write. The person who wished to become an opposer to the confirmation of the bishop of Manchester (*v*) may now come forward for a mandamus, and argue that that act was null and void because his opposition was shut out for the same bad reason. True, that right reverend prelate has been consecrated; but if this court of confirmation is bound to hear all

opposers, and the refusal renders the proceedings null and void, a very plausible foundation at least is laid for a motion for a mandamus in that case as well as this.

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Some dicta were also cited from our law books, or rather in one dictum in the case of *Evans v. Askwith*, reported by Sir Geffry Palmer and Sir W. Jones (*w*). A distinction was taken between a bishop elect only, and a bishop confirmed. The dean of York had been promoted to an Irish bishoprick. In an interval of a year, which passed between his promotion and his confirmation, he had granted a lease as dean, and the question was whether he was not incapacitated from doing so by becoming a bishop. The Court said he was not a bishop till confirmed: his title to the temporalities was but inchoate. The Court said "till confirmed he may possibly be rejected." One of the judges in the course of the very extended argument, about half the length of that argument which we have lately heard, declared that opposers on the occasion are always summoned. This was perfectly unexceptionable; but it proves nothing to the point. His full title depends on the archbishop's confirmation; and in the course of that proceeding opposers are called for: they were called for on the present occasion. Judge Whitlock, to show that the nomination was not alone sufficient, alludes to the possibility of its never being completed, and speaks of the ceremony, which plainly shows its imperfection; but he drops no hint that he had ever heard of an opposer being admitted, and so he leaves the case precisely where it was.

Judgment of Lord Denman.

Evans v. Ascutibe.

A useful pamphlet (*x*) was referred to by the learned civilian who supported the rule, a collection of extracts showing the sentiments entertained by canonists, divines, and others, upon the royal prerogative, not by judges or students of either branch of law. The general scope of this little work is to illustrate the doctrine so clearly laid down in the 37th of our Articles, that the Sovereign has not the power of the keys, and cannot confer orders.

"Royalty of the Crown."

"The Queen's Majesty hath the chief power in this realm of England, and other her dominions, unto whom the chief government of all estates of this realm, whether they be ecclesiastical or civil, in all causes doth appertain, and is not, nor ought to be subject to any foreign jurisdiction. Where we attribute to the king's majesty the chief government, by which titles we understand the minds of some slanderous folks to be offended, we give not to our princes the ministering either of God's word, or of the sacraments, the which thing the injunctions also lately set forth by Elizabeth our queen do most plainly testify—but that only prerogative which we see to have been given always to all godly princes in holy scriptures by God himself; that is that they should rule all states and degrees committed to their charge by God, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil doers." The whole of this article must be taken together. There is no power of the keys; none to ordain, or to absolve—but there is a power over "all states and degrees committed to their charge by God, whether they be ecclesiastical or temporal."

37th Art. of Religion.

(*w*) *Supra*, pp. 51, 107, 146, 201, &c.

(*x*) "The Royalty of the Crown, &c." *Supra*, p. 279.

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Canterbury.*

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Lord Denman.*

This is the power claimed now to be exercised by the Crown, but which the Crown does not in effect possess, if the archbishop can reject on opposition the bishop nominated by the Crown.

One of these extracts "taken from a dialogue between a Roman Catholic and a member of the Church of England" is remarkable. The Catholic objects that under the Reformation there are as many popes as kings, and that they do assume priestly power; but the answer of the member of the Church of England is this: "The freedom of election doth not exclude the king's sacred authority, but force and tyranny only. If any unworthy person should be forced upon them against their wills, or the clergy should be constrained to give their voices by force and threatening, such an election cannot be said to be free. But if the king do nominate a worthy person according to the law as our kings have used to do, and give them authority to choose him, there is no reason why this may not be called a free election. For here is no force nor violence used." Then the Catholic proceeds: "But if the king, deceived by undeserved recommendations, should happen to propose to the clergy a person unlearned or of ill morals, or otherwise manifestly unworthy of that function, what is to be done then?" The answer is, "Our kings are wont to proceed in these cases maturely and cautiously—I mean with the utmost care and prudence; and hence it comes to pass that the Church of England is at this time in such a flourishing condition." Then he pursues it: "Since they are but men, they are liable to human weakness, and therefore what is to be done if such a case should happen?" The answer is, "If the electors could make sufficient proof of such crimes or incapacities, I think it were becoming them to represent the same to the King with all due humility, modesty, and duty, humbly beseeching his Majesty out of his known clemency to take care of the interest of the widowed Church. And our princes are so famous for their piety and condescension that I doubt not but his Majesty would graciously answer their pious petition, and nominate another unexceptionable person agreeable to all their wishes. Thus a mutual affection would be kept up between the bishop and his church. Thus I have showed you that our kings have had a singular prerogative in the election of bishops, and now I am to prove that they had the same lawfully." Then King Charles 2 is alluded to in this pamphlet as "having taken into his serious consideration how much it will conduce to the glory of God, his (the king's) own honour and the welfare both of our Church and Universities that the most worthy men be preferred and favoured according to their merits," and made an order that no secretary of state should move his Majesty on the behalf of any person whatever for preferment in the church without having the attestation of certain high persons, including the Archbishop of Canterbury and the Bishop of London for the time being. King William 3 made a similar order; but all this was without the least reference to the supposed power of the archbishop to examine and to enter into any proceeding at the time of the confirmation. Bishop Gibson is mentioned in the same pamphlet, and he is a most remarkable authority in my opinion upon the subject. He was assailed by one of the most learned judges who ever sat in this

*Measures taken
by Charles 2
and William 3
for appointing
fit persons to
bishopricks.*

Bishop Gibson.

court, Sir Michael Foster, as one disposed to erect the Church into an imperium in imperio, a sacerdotal order which must in time absorb all the other powers in the state. Gibson wrote his invaluable treatise the Great Storehouse of Ecclesiastical Law, and from that, copying more ancient works, we derive all the evidence in favour of this application. Yet neither in that work nor in the course of any proceedings taken by him does he assert the existence at any time of a power in the archbishop to defeat by such an inquiry as that suggested the nomination of the Crown.

There were certainly questionable appointments made of persons of doubtful orthodoxy, upon which it is only necessary to mention that no less than four times Bishop Hoadley gave all mankind the opportunity which resulted from this supposed court of summoning all to appear to make their opposition to his election on account of his opinions. No such opposition was ever made, though there might be, and very probably was, remonstrance against his appointment. Acting on this principle, too, Archbishop Wake remonstrated successfully against the promotion of Samuel Clarke, and Bishop Gibson against that of Dr. Rundell. From an able treatise lately published in a magazine, which is quoted in the same pamphlet, we are told that other sovereigns have consulted the archbishop before they promoted to offices of such high importance. But not a word is uttered to show that the archbishop could institute, and was bound to institute, an inquiry into the merits and demerits of the parties nominated by the Crown if any opposer thought proper to malign them at the time of confirmation.

I will not take an imaginary case, but will now advert to recent facts as much a part of the history of our country as those which occurred in the time of Henry or Elizabeth. We know that on the rumour of an intention of the Crown to make a particular promotion thirteen or fourteen right reverend bishops thought the appointment highly objectionable, and addressed to the prime minister a strong remonstrance against it (*y*). They urged various topics—the probable discontent of the clergy, the recorded censure of one of our universities; but there was one topic of far greater weight if this application is sustainable to which they never adverted. They never warned the minister against the scandal of a public opposition at the time of confirmation, and the possibility of the Queen's nominee being rejected by the archbishop as a heretic. One of the most distinguished among them (*z*) warmly entreated for the dean and chapter, that they might not be exposed to the peril of a *præmunire*, nor be called upon to elect one whom in their conscience they could not approve, since their rejection must be followed by that consequence. There was no such intercession in favour of the archbishop who might incur the same danger; no intimation that his grace was not equally bound by the statute to confirm the person if he should be named by the Crown, no assertion of the danger and disgrace of an opposition so likely to arise in numerous quarters if one condemned by a convocation at Oxford should be elevated as a mark for animadversion in St. Mary's Church.

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Opportunities for asserting the right, afforded by appointments of men of doubtful orthodoxy.

Bp. Hoadley.

Remonstrances by Abp. Wake.

Remonstrance of 13 bishops in the present case.

(*y*) Vide *supra*, p. 6, n.

(*z*) The Bishop of Exeter; in the letter referred to, *supra*, p. 195, n. (*s*)

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The archbishop not converted into a mere machine by being obliged to perform his ministerial office.

The archbishop is said to be converted into a mere machine by exercising the functions with which he is well contented. The phrase suggests to me the idea that our writ is sought for to construct a machine fraught with something like galvanic influence to revive a body which has been dead for ages—that it may perform some convulsive manœuvres for twenty days, and then relapse for ever into its dread repose. But this simile would imply that the form once had animation which in my conscience I do not believe.

It is not true to represent the archbishop as a mere machine, even if ministerial in the confirmation.

I have shown some duty attaching to that office not unlike that of a returning officer at a parliamentary or municipal election. This confirmation is necessary to give the new bishop all his rights. The archbishop is not unlikely to make some inquiry touching the bishop elect; and if the result should lead him to the opinion that the appointment would be injurious, he may (as we have seen) advise the Crown in the first instance against issuing the *Congé d'Elire* and Letter Missive. Even afterwards, if he is since informed of facts which really convince him of such mischief, he may still resort to the sovereign and request to be relieved from the painful duty imposed by the statute. He may make it clear that the *Congé d'Elire* and Letter Missive were obtained in ignorance of the truth and ought to be set aside.

His duty, when he cannot conscientiously confirm.

Extreme cases are ingeniously devised, but are not, and cannot with decency be thought, possible; but even if the worst be supposed, if the Crown will persist against warning and remonstrance in nominating a bishop whom the metropolitan cannot consent to confirm, without violating his conscience, his duty is clear. He must act as some of our predecessors in old times have done, when required to submit to dictation from the Crown—they forfeited their offices by not obeying—he must resign. From the course taken by the present archbishop, I have no doubt that after hearing of the objections notoriously made to the doctrine of Bishop Hampden, his grace has formed the deliberate opinion that those objections have no solid foundation,

Argument founded upon the solemnity of the proceedings.

I would ask whether it has been the opinion of any person until within these few weeks, and until this unhappy controversy arose, that the absolute power of appointing bishops was not in the Crown. If it has only come into being since this very inflamed state of mind has arisen, surely we ought to regard all arguments upon the subject drawn from remote antiquity, and from obscure cases, with very considerable jealousy. When I heard Sir *Fitzroy Kelly*, with his impressive solemnity of manner, entreat that we would not expose the archbishop to the mockery and shadow of having all the prayers recited, for the mere purpose of going through a form, and acting a farce, I confess I hardly knew how to meet it. Are the dean and chapter to be treated as nothing? Do they proceed without prayer and without solemn ceremony?—If they are required, notwithstanding all this, under the threat of penal consequences to elect a particular person, and none other, the law which compels them may be an unreasonable, ill-considered, and impious act of parliament that ought to be repealed; but why should there be more objection

on account of this solemnity being introduced to the archbishop's share than to that of the dean and chapter? I forbear for obvious reasons entering more fully into that. I was reminded of the Roman augurs, who were said never to meet one another without laughing, and I think that if these gentlemen had induced us to issue this writ upon considerations of the incredible scandal and impropriety of using a solemnity upon such an occasion, they would have had some reason to laugh at our expense. I agree with my brother Coleridge, that our time has been much too short to write as fully as might be desired, though not I think to form a satisfactory opinion. I have devoted as much time as I could afford to the task of placing my conclusions upon paper, that nothing might bear the least appearance of captious remarks upon what has fallen from my two learned brethren, in their most able and well considered arguments. I abstain from all such remarks, with this single exception, that my brother Coleridge's argument has strengthened my opinion against the motion, by proving how the plain law of England may be put in hazard by learned speculations on obscure works of doubtful import anywhere, and of no authority here.

Now comes the question which presses most on my mind. Having stated my reasons for the opinion which I deliberately form, and conscientiously entertain that this never has been at any time the law of England, I must be of opinion that the Court ought to refuse the writ of mandamus; but upon that opinion I have had the greatest difficulty, and have felt the greatest possible hesitation in acting, because I feel the authority of my two learned brothers, and the ungracious appearance of refusing the opportunity of inquiry. In any ordinary set of circumstances, in the case of an enclosure, of a railway or matter of property, we should have no question whatever that the doubt of any one on the bench would have made further inquiry desirable, I should have instantly agreed. A writ of error would lie in that case to correct any opinion that might be shown on more discussion to be erroneous. But every judge must act on his own conviction. I own that my opinion is so entirely settled, and I must say so entirely unchanged by what I have heard of the argument to-day, that feeling the utmost disposition to do all that can be done to show my respect for my learned brothers, I do not think that I can consent to say for my part that this writ ought to go. I think it ought not—I feel confident that if it went it would be good for nothing—if held valid, *primâ facie*, I have no doubt that the return which would be made to it would give it a complete answer. I am satisfied that the only effect of all this would be, to keep alive the dreadful agitation and frightful state of religious, or rather let me say, theological animosity, which it is impossible not to observe in this country. There would be a delay of at least two years—probably four more days would be consumed in argument—and we cannot tell how much more when it would come into the court of error. The bishoprick all that time would be vacant—perhaps other vacancies might occur, and no doubt the example here set would be followed, and in every case I should expect in the excited state of men's minds that the archbishop would be called upon to summon all mankind to hear whether they had any thing to say against the

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Peculiar reasons in the present case for withholding the writ of mandamus.

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bishop elect, and to open a court that would probably never be closed.

We have a discretion to issue, or to withhold, the writ of mandamus. Supposing even that I thought it very doubtful how the law was, supposing that I thought that the archbishop was bound to hold a court for confirmation, still I apprehend that I should have a discretion to exercise. The Bishop of Manchester has been consecrated in spite of some attempt at opposition, and I believe it would be held that the Bishop of Manchester's consecration cannot be questioned. This opposition is put forward before consecration; but if consecration had taken place, or even now should follow, then I apprehend that it cannot be questioned, except on the supposition that the proceeding is altogether null and void: of this I see no trace of any evidence whatever in any records in this country, only some few words scattered in ancient volumes, recording the events of a state of society the most uncertain and obscure.

Now under all these considerations, feeling the utmost respect for my learned brethren, and the greatest regret that we do not take the same view, I must own that I feel that some deference is due also to the high person who is named as the defendant in this rule. Some deference is due to those who certify the fitness of Bishop Hampden for the office to which he is elected. Still more deference is due to the peace of the Church, and to the tranquillity of the State. It seems to me that we should be putting every thing to hazard, and leading to consequences which it is impossible to foresee, if we, who are firmly convinced that there is no such law as that upon which these parties seek to act, encouraged the smallest doubt as to its existence. Reserving my opinion on that point till I had heard all the observations of my learned brothers, and keeping my mind open to the last and free to say that this is a question which ought to be discussed, I must fairly say, with all respect for my brother Coleridge's admirable argument, that it has confirmed me in the opinion of the danger of exposing the Act of Parliament, and the most simple construction of the plainest language, and the most inveterate and universal opinion on its effect, to the speculations of those who will bring their forgotten books down, and wipe off the cobwebs from decretals and canons, before they can find one argument for disturbing the settled practice of three hundred years.

In my opinion this rule ought to be discharged.

Rule discharged.

The opposers afterwards submitted the following Case to Counsel:—

Case submitted
to counsel by
the opposers.

CASE.

“The see of Hereford having lately become vacant, by the promotion of Dr. Musgrave to the Archiepiscopal see of York, Dr. Hampden was, in obedience to the Queen’s mandate and letters missive, elected in his room, by the Dean and Chapter of Hereford. At a Court holden by the Vicar General of the Archbishop of Canterbury, at Bow Church, on the 11th day of January last, for the purpose of confirming such election, in answer to the first citation, three clergymen (two of whom hold benefices in the diocese of Hereford) came forward by their Proctor to oppose Dr. Hampden’s confirmation, and in due form of law tendered articles of objection, impeaching his orthodoxy; the Vicar General refused to entertain the objections, or even to suffer the opposers to appear; thereupon they applied to the Court of Queen’s Bench for a Mandamus, to compel the Archbishop or his Vicar General to hear them.

“That Court at first granted a Rule Nisi, but on cause being shown, the Judges were equally divided in opinion, and in consequence the application for the Mandamus fell to the ground.

“You are now requested on the part of the objectors to state your opinion, whether they can or ought to take any and what further steps, either by a Writ of Error, Appeal, Petition to the House of Lords, or otherwise, with a view first to establish their right to urge their objections in opposition to Dr. Hampden’s confirmation, and if successful then to try the question of his fitness, in point of doctrine, to be confirmed and consecrated to the see of Hereford.”

OPINION.

“As the Court of Queen’s Bench has given no judgment in this case, neither declaring what the law is, nor enabling the objectors to ascertain it, we cannot suggest any other means by which redress can be secured.

Opinion
thereon.

“We are of opinion, that no writ of error lies from the late proceedings in the Court of Queen’s Bench, that remedy being confined to cases where the writ of mandamus has issued, and it is for this very reason that on other occasions, however unimportant (as Lord *Denman* admitted in his judgment (a)), where any of the judges have expressed the slightest doubt, the Court has always allowed the writ to go, to prevent a failure of justice; the late statutes of 1 Wm. 4, c. 21, and 6 & 7 Vict. c. 67, having been passed expressly for the purpose of giving, by means of that writ, more easy and effectual relief.

“We are also of opinion that no appeal lies in the present case from the sentence of the Vicar General to the Judicial Committee of the Privy Council, the want of such a power of appeal having not only been admitted, both by the bench and at the bar during the late argument in the Court of Queen’s Bench, but having also been expressly declared by Mr. Justice *Patteson*, in his judgment (b).

(a) *Supra*, p. 495.

(b) *Supra*, p. 480.

Opinion of
Counsel.

"We think, however, that under these circumstances, it may be desirable for the objectors to present a petition to the House of Lords, setting forth the facts of the case, and praying their lordships to take such steps as they may deem expedient for providing an adequate remedy, and for ascertaining what the law on this subject really is. As the judges of the Queen's Bench are equally divided in opinion, it is obvious that the law is at present doubtful, and that the Court is unable to remove that doubt; and it is impossible to deny that the greatest inconvenience must exist so long as the doubt remains; for not only may the very same difficulty recur on every future confirmation of a bishop, but the validity of Dr. Hampden's episcopal acts, and the exercise of his jurisdiction, will be liable to be disputed. Independently of these reasons, it may be presumed that the House of Lords will be disposed to entertain such a petition, as involving matters affecting its own privileges; for if Dr. Hampden's election be not duly confirmed, he has no right to a seat in that house, that right accruing only upon confirmation, when legally performed.

"FITZROY KELLY.

"J. ADDAMS.

"A. J. STEPHENS.

"EDWARD BADELEY."

"*Temple, Feb. 18, 1848.*"

In consequence, however, of recommendations from quarters entitled to the highest respect, the promoters did not adopt the suggestion, embodied in the foregoing opinion, to petition the House of Lords.

Memorial from
the opposers to
the Archbishop
of Canterbury.

A memorial from the promoters to His Grace, the Archbishop of Canterbury (Dr. Howley), was prepared, and delivered at Lambeth Palace, on the 4th of February. It was as follows:—

"To the Most Reverend Father in God, William, by Divine Providence, Lord Archbishop of Canterbury, Primate of all England, and Metropolitan.

"The dutiful memorial of the undersigned, Richard Webster Huntley, M.A., of the University of Oxford, Vicar of Alberbury in the Diocese of Hereford, John Jebb, M.A., of the University of Dublin, Rector of Peterstow in the Diocese of Hereford, and William Frederick Powell, M.A., of the University of Cambridge, Perpetual Curate of Cirencester, in the Diocese of Gloucester and Bristol,

"Showeth,

"That on the eleventh day of January, 1848, we appeared in the Court of your Grace's Vicar General, in the Church of St. Mary-le-Bow, for the purpose of presenting in due form certain objections, which in our consciences we believed it our duty, as Priests of God's Church, to offer against the Confirmation of the Reverend Renn Dickson Hampden, D.D., as Bishop and Pastor of the Cathedral Church and Diocese of Hereford.

"We appeared in answer to a citation of the Court for that

purpose, in which citation we were promised that our objections should be heard. But by the decision of that Court, when we appeared, followed by a division of opinion among the Judges of the Court of Queen's Bench, upon a question of the Statute Law of the land, which had come to be involved in the aforesaid proceedings, we are now precluded, as we are well advised, from bringing our objections to a proper hearing and trial in any form presented by any of the courts of the country.

Memorial to
the Arch-
bishop.

"The said Renn Dickson Hampden, is, we believe, about to be presented for Consecration. At this crisis, we ask permission to lay before your Grace this respectful, but decided expression of our sense of a wrong done to us (and in us to the Church), by our being refused a hearing; of the scandal of such an unreal and delusive citation; of the dangerous consequences of a form of confirmation so persisted in; as well as of the questionable character of a consecration administered under the aforesaid circumstances.

"We still derive consolation from the hope that we shall not in vain seek for refuge in the paternal care of your Grace as our Metropolitan; and that we may successfully implore you, as the Spiritual Head and Pastor of the Branch of Christ's Church in this Kingdom, to take into consideration (ere it be too late) the objections which it was then our desire to allege, and which once for all we declare our readiness to produce.

"Persuaded of your Grace's patience and paternal indulgence, we request leave to state, that the said objections are founded upon the suspected unsoundness of the Reverend Dr. Hampden as a Teacher of the Christian Faith; that this unsoundness appears in his Bampton Lectures, and in his Observations on Religious Dissent, and that, not only in particular or detached passages of those works, but also in the general character of expression, and in the drift and design of the whole. Those works, we submit, are calculated to unsettle the minds of Christians upon points of Doctrine positively propounded by the Church as Catholic Truths, and to reduce to the level of mere theological opinions, those Dogmas and Deductions, and exact Declarations, which have been carefully set forth by the Church in the Creeds, and in her formularies, as things which 'ought thoroughly to be received and believed.'

"We do not assert these inferences upon our own mere construction of the teaching of Dr. Hampden; but we have his own explanation and commentary to this effect in the more popular of his works.

"We were prepared to show in detail that the said Dr. Hampden has, in those writings, whether in intention or not, yet in fact, among other things taught contrary to the sixth, eighth, ninth, tenth, thirteenth, sixteenth, twentieth, twenty-fifth, and thirty-fourth, Articles of the Church of England, and in derogation of other Articles, including the first five.

"These and further particulars, which we do not herein relate, we were ready, with the assistance of our advocates, to prove, if so permitted, in the Court of your Grace's Vicar General; and we do yet desire to have a lawful opportunity of proving them on evidence

Memorial to
the Arch-
bishop.

drawn at large from the same works of Dr. Hampden, which are still in circulation.

"We feel assured that your Grace will never be 'hasty in laying on hands, and admitting any person to government in the Church of Christ,' and hence we confidently adopt, as our remaining and best resource, this appeal to those moral and religious obligations that are superior to every earthly consideration.

"Allow us therefore humbly to pray, that a competent ecclesiastical inquiry into our objections, and into the whole of the works we have mentioned, may yet be made by your Grace, or under your direction, before the solemn act of Consecration shall be proceeded with in the face of all that has transpired, of the alarm and suspicion which are shaking the confidence of Christian people, and of the gathering mischiefs that may otherwise fall upon the Church of God in this Kingdom.

"In all that has been attempted in our names, we entreat your Grace to believe, that, far from desiring to add to the uneasiness suggested to your mind by the case itself, or wishing to utter complaints, or to promote any public excitement on this painful subject, nothing would afflict us more than to have it supposed that our acts have been intended otherwise than as an expression of reverence for the solemn office in Christ's Holy Church to which your Grace is called, and of an earnest and dutiful desire to uphold the inherent spiritual rights of our Metropolitan.

"And thus heartily praying for all Divine favour and peace upon your Grace, especially at this time, we commend ourselves, in all filial affection and humble respect, to your benediction, and, in so far as in these proceedings our errors, or our infirmities may require it, to your forgiveness.

"We have the honour to remain,

"My Lord Archbishop,

"Your Grace's most dutiful servants and sons in the Lord,

"R. W. HUNTLEY.

"London.

"JOHN JEBB.

"The 4th day of February,

"W. F. POWELL."

"in the year of our Lord, 1848.

"To his Grace

"The Lord Archbishop of Canterbury,
&c., &c., &c."

Death of Arch-
bishop Howley,
and presenta-
tion of the
memorial to his
successor.

When the preceding memorial was delivered, his Grace was labouring under a severe illness, (of which he died on the 11th of February), and, in consequence, never saw the memorial. It was afterwards forwarded to his successor (Dr. Sumner, promoted from the see of Chester), who acknowledged its receipt in the following letter, addressed to one of the opposers, the Rev. W. F. Powell.

"Reverend Sir,

"I write to acknowledge the receipt of the memorial, to which your letter alludes, on the subject of Dr. Hampden's consecration.

"The signature of three clergymen will ensure to it all due attention from

"Rev. Sir,

"Your faithful servant,

"J. B. CANTUAR."

The Arch-
bishop's
answer.

His Grace, however, did not think proper to comply with the prayer of the memorial, but, on Sunday, the 26th of March, 1848, in the chapel of Lambeth Palace, consecrated Dr. Hampden Bishop of Hereford; being assisted, on the occasion, by the Bishop of Llandaff (Dr. Copleston), the Bishop of Norwich (Dr. Stanley), and the Bishop of Worcester (Dr. Pepys).

Consecration
of Dr. Hamp-
den.

On Thursday, the 27th of April, 1848, Dr. Hampden was installed in Hereford Cathedral(c).

Installation.

(c) After the Archbishop's mandate to instal Dr. Hampden had been read, the Chapter Clerk presented to the Canons assembled a protest from the Dean (who was not present); but they would not either receive it or allow it to be read. The installation was then proceeded with. The protest, which is here subjoined, alleged, amongst other things, certain irregularities in the transmission of the mandate, and in the mode adopted of citing the Chapter for the installation: they are mentioned towards the end of the document.

"In the name of God, Amen. To all to whom these presents shall come, specially to the Canons of the Cathedral Church of Hereford, John Merewether, Doctor in Divinity, Dean of the Cathedral Church of Hereford, lawfully constituted, and as styled in the form of his installation therein, rector thereof, Greeting.

Whereas, in the year 1836, the Rev. Renn Dickson Hampden, Doctor in Divinity, was appointed Regius Professor of Divinity in the University of Oxford.

"And, whereas, in the same year, it was in convocation of the University of Oxford decreed as follows—'Seeing that it has been committed by the University of Oxford to the Regius Professor of Divinity, that he should be one of the number of those by whom the select preachers are appointed according to Tit. XVI. s. 8 (addenda, p. 150), and that his counsel should be given if any preacher should be called in question before the Vice-Chancellor according to Tit. XVI. s. 11 (addenda, p. 154), and since he who is now professor has treated theological subjects in such a manner in his published works that the University, in this respect, hath no confidence in him—it is, therefore, decreed that the Regius Professor of Divinity be deprived of the afore-mentioned offices until it shall otherwise please the University. But, lest the University, to the mean time, should suffer any

detriment, let others discharge the functions of the said Professor, namely, in appointing the select preachers. The senior among the deputies of the Vice-Chancellor, or he being absent, or filling the place of Vice-Chancellor, the next in order, provided always that he shall have taken holy orders; and in holding any consultation concerning sermons, the lecturer of Lady Margaret, Countess of Richmond.'

Protest of the
Dean against
the installation.

"And, whereas, in the year 1842 the following proposition was in convocation made—'Seeing that, by the statute Tit. XVI. s. 8-11, promulgated and confirmed in the house of convocation, on the 5th day of May, 1836, it was determined that the Regius Professor of Divinity should be deprived of certain offices mentioned in the same statute until it should otherwise please the University: It hath pleased the University to abrogate that statute;' and the said convocation thereupon decreed *not* so to abrogate it, and it has never been abrogated to this day.

"And whereas the said Dr. R. D. Hampden, in the correspondence which thereupon ensued with his Grace the late Archbishop of Canterbury, thus wrote—'I disclaim the calumnious imputations with which I have been assailed; I disclaim them for myself; I disclaim them for my writings; I retract nothing that I have written; I disown nothing;' and, again, in the preface to the second edition of his 'Bampton Lectures,' p. 19 of the introduction which professed to be an explanation, he writes—'I see no reason from what they (objectors) have alleged for changing or retracting a single statement.'

"And whereas, when, upon the translation of the late Bishop of Hereford, Doctor Thomas Musgrave, to the Archiepiscopal See of York, it was understood that the said Dr. Renn Dickson Hampden was to be appointed to the See of Hereford, although the same was not yet vacant, the late Archbishop of Canterbury, Dr. Wm.

Protest of the
Dean of Hereford.

Howley, did write a letter of objection and remonstrance, and also thirteen other Bishops did join in a combined remonstrance; and another Bishop also wrote a separate letter of similar objection and remonstrance to the Right Honourable Lord John Russell, the First Lord of the Treasury, against the said appointment.

"And whereas addresses to the number of from ninety to a hundred, as well as numerous letters from individuals of all shades of opinion tolerated in the Church of England, were presented to the Dean and Chapter of Hereford, intreating them not to elect the said Dr. Renn Dickson Hampden, should the *congé d'élire* be issued in his favour, notwithstanding the various objections stated.

"And whereas, I, the Dean of the said Cathedral Church, did fully and fairly represent the same to the Right Honourable the Lord John Russell, the First Lord of the Treasury, both by personal communication and repeated letters.

"And whereas, when the *congé d'élire* and letter mandatory were received, and the Dean and Chapter assembled on the 28th day of December, 1847, to consider of the same, the said Dr. Renn Dickson Hampden, was not duly elected according to the statutes of the said Cathedral Church, to observe which each member of the same is by oath obliged.

"And whereas, upon certain members thereof proposing to affix the capitular seal to certificates of election unstatutably made, I, the Dean, did specially object thereto, and in due form in writing protest against the said course and the said election, and which protest, duly signed, sealed, and attested, was attached to the documents so in spite of my objection sealed.

"And whereas, on the 11th of January, at Bow Church, in the city of London, a confirmation of the said unstatutable and invalid election was forcibly made, notwithstanding that when opposers were called three beneficed clergymen of the province of Canterbury, two of them of the diocese of Hereford, did appear by their duly authorized proctors and advocates, but were not permitted to proceed.

"And whereas, on the 14th day of January, 1848, the said opposers feeling aggrieved by such proceedings, did thereupon move the Court of Queen's Bench for a rule to show

cause why a mandamus should not issue to permit and admit, in due form of law, the said opposers to oppose the said confirmation, and require the Lord Archbishop of Canterbury and his Vicar General to hear and determine upon such opposition, and upon the articles, matters, and proofs thereupon, and the said rule was granted.

"And whereas, on the 24th day of January, 1848, and three following days, the arguments upon the said rule were heard at great length, and on the 1st of February the matter was, in effect, left undetermined, as it appeared that, of the four Judges on the bench, two were in favour of making the rule absolute, and two against it.

"And whereas, upon the lamented death of the late venerated Archbishop Howley, to whom an appeal had been made by the said opposers, and the appointment of his present Grace the Lord Archbishop of Canterbury, the same appeal was presented to his Grace Dr. Sumner, and also an address and appeal signed by 1,650 priests of the Church of England, praying his Grace to surcease from consecration of the said Dr. Renn Dickson Hampden, besides another address signed by a very large number of clergy and laity, all having the common object of obtaining a satisfactory investigation and decision, by a competent ecclesiastical inquiry into the objections and the whole of the works so objected to, and which has not been granted.

"And whereas, I myself presented an appeal to his Grace, which was duly acknowledged, praying visitatorial decision upon certain important matters, touching the stringency of oaths, and the obligation and effect of our cathedral statutes, and the postponement of the said consecration until such questions were resolved, which has never yet been replied to.

"And whereas on Sunday, the 26th day of March, the said Dr. Renn Dickson Hampden was consecrated at Lambeth Palace, and a mandate to instal him in the Cathedral Church of Hereford has, as is alleged, been issued, but which I, the Dean of the said Cathedral Church, have never seen, it having been sent to the Bishop's secretary, deputy registrar of the diocese of Hereford, and by him to the canon in residence, and not, as it ought to have been, to the chapter clerk, the registrar of the Dean and Chapter, in the first instance.

"And whereas, the said canon in residence has called together the residentiaries of the said Cathedral Church, and irregularly issued, as I am informed, a citation to the general chapter, I having, under the circumstances, and in the absence of any authority to me delivered or conveyed (the mandate never having passed into my hands, nor having ever been seen by me), been precluded from interfering in the matter.

"Therefore I do declare and proclaim my dissent to the said proceedings as irregular and unstatutable, and protest against the said proposed installation in the Cathedral Church of which I am dean, archipresbyter, and rector; and inasmuch as the whole course of events, touching the appointment, election, confirmation, and consecration of the said Dr. Renn Dickson Hampden, I do believe to be uncanonical, inconsistent with those decrees and usages of the Church of Christ upon which the practice and discipline of the Church of England have ever been considered to be based, and injurious, in the most essential manner, to the vital interests of that Church. And I do further solemnly declare, that I make this protest, not

from any considerations which can be regarded, in the slightest degree, as having any personal reference to the said Dr. Renn Dickson Hampden, as an individual, inasmuch as I have never spoken or written to him, nor he to me, but I do so protest because I could not conscientiously, nor consistently with my previous conduct, take any part in the said installation, and because I believe that it is my bounden duty to God and His Church to do so, notwithstanding the painful position in which I may be placed thereby, and in spite of the consequences which may result, and be productive not only of perplexities and difficulties, but of obloquy and misrepresentations of my motives, and of positive injury to my own interests.

"And, finally, I do claim and require that this my protest be entered in the act book of the Dean and Chapter of the Cathedral Church of Hereford.

"Given under my hand and decanal seal, this 26th day of April, in the year of our Lord, 1848.

"JOHN D. MEREWETHER,

"Dean of the Cathedral Church of Hereford."

Protest of the
Dean of
Hereford.



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